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No. 07-104

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AARON RAISER,
Petitioner,

v.

THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS,
BRIGHAM YOUNG UNIVERSITY,
Respondents.

October Term, 2007

Petition for Writ of Certiorari to the

United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari

Aaron Raiser, Pro Se
20058 Ventura Blvd. #113
Woodland Hills, CA 91364

Questions Presented for Review

1. (a) Whether the Tenth Circuit violated the Erie Doctrine (*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)) by applying state procedural law to a federal diversity proceeding when it held that Utah *State* Judicial Proceeding Immunity law applied to a *Federal* Diversity action proceeding in the *Federal* Court?

   (b) Whether Federal Judicial Proceeding Immunity gives immunity to a legal tort committed by a litigant in a civil action proceeding in federal court simply because the fruits of the tort were revealed during the course of the proceedings?

2. (a) Whether a religiously controlled university, operating and controlling its own state police force, violates the Establishment Clause[1]?

   (b) Whether a religiously controlled university, operating and controlling its own state police force, violates the Establishment Clause where that religiously controlled university uses their state police force for the school's own private non law-enforcement purposes?

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[1] There is a split between the highest court of another state and the Tenth Circuit on the issue. The North Carolina Supreme Court (See *State v. Jordan*, 574 S.E.2d 166 (N.C. App. Ct. 2002) (review denied, 356 N.C. 687, 578 S.E.2d 321 (2003))) let stand the state court of appeals ruling that a religiously controlled university operating its own police force violates the Establishment Clause of Amend. I of the U.S. Constitution under both *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

(c) Whether a religiously controlled university operating its own state police force violates the Establishment Clause where the state - which trains, accredits and empowers that police force - must exercise state oversight of the religious university to ensure that the state police power is used only for non-religious purposes, such to bring it under the purview of the third prong of the Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)?

(d) Whether a police force controlled by a religious organization has sufficient important discretionary state authority as set for in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) so as to violate the Establishment Clause?

(e) Whether a police force controlled by a religious organization which was created and empowered along religious lines by state statute using neutral language, should be found in violation of the establishment clause in light of *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) where this Court struck down a state statute using neutral language which created a school board along religious lines?

3. (a) Whether Due Process of Law is denied where a plaintiff is denied the opportunity to depose via telephone a witness having the information necessary to prevail against a summary judgment motion in a civil case, where the plaintiff - who lives in another state over 800 miles from the witness - accurately informed the court he was homeless and barely had enough money for food from day to day, making travel to the deposition prohibitive, and where the defendant made no showing they would be prejudiced by a telephonic deposition, and where Fed. R. Civ. Proc. 30(b)(7) provides for the chance to do telephonic depositions?

(b) Whether Due Process of Law as embodied by the Federal Rules of Civil Procedure is violated where a federal judge disallows a plaintiff a chance to depose the most important witness in a civil case and the only one having the information necessary for the plaintiff to prevail in the case, where the defendant made no showing as to why that witness could not be deposed?

(c) Whether Due Process of Law as embodied by the Federal Rules of Civil Procedure is violated where a federal judge requires a plaintiff in a civil case to make a special showing to the court that discovery is needed prior to being permitted to conduct the discovery necessary to prove the facts of the Complaint, where the defendant gave no reason or basis for limiting discovery, and where the judge then severely limited the plaintiff's discovery to the point that the plaintiff could not obtain the facts necessary to survive a motion for summary judgment?

(d) Whether Due Process of Law as embodied by the Federal Rules of Civil Procedure is denied when a judge denies a plaintiff the chance to utilize Fed. R. Civ. Proc. 31 to conduct a written deposition of a witness living in another state, where the plaintiff did not have the financial means to travel to conduct an in person deposition, and where the plaintiff lost the case on summary judgment because the plaintiff could not obtain the testimony of that witness?

(e) Whether Due Process of Law as embodied by the Federal Rules of Civil Procedure is violated where a federal judge disallows a plaintiff access to a key document in possession of the defendant which document shows that the plaintiff would prevail on his breach of confidence/fiduciary duty cause of action?

4. (a) Whether Fed. R. Civ. Proc. 15 is violated where plaintiff files a motion to amend the complaint 3 months into the proceedings, and federal judge holds it in abeyance for 1 year, then after 1 year denies the motion to amend because after 1 year the right to amend is no longer automatic, where the opportunity to amend the complaint was essential in order to prevail in the civil action?

   (b) Whether Fed. R. Civ. Proc. 15 is violated where plaintiff files a motion to amend the complaint and the judge makes the right to amend the complaint contingent upon discovering the facts needed to support the amendment of the complaint, and where the judge then disallows the needed discovery to find any facts to support the amendment of the complaint?

5. Whether summary judgment for a defendant is proper where the only witness for the defendant in the entire case was shown to have committed perjury or materially mislead the court on a material issue of fact upon which the outcome of the case depended?

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On February 7, 2006 the District Court entered an Order Dismissing the Case. (Appendix A).

On January 10, 2007 the Court of Appeal for the Tenth Circuit entered an Order affirming Dismissal. (Appendix B).

JURISDICTIONAL STATEMENT

The date the order and judgment was entered by the Court of Appeals for he Tenth Circuit was January 10, 2007. A petition for rehearing was denied on February 20 , 2007. An extension of time was permitted to file this Petition.

This Court's jurisdiction to review, on a writ of certiorari, the decision of the United States Court of Appeals for the Tenth Circuit affirming the Order denying the pseudonym is conferred by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS & RULES

See Appendix L, M.

STATEMENT OF THE CASE

The underlying case alleged common law claims for breach of privacy, confidence and fiduciary duty in diversity. A cause of action for an Establishment Clause violation was also added when it became apparent that Brigham Young University (BYU), a religiously sponsored (by Respondent Church of Jesus Christ of Latter-Day Saints (Church)) and controlled university, used their state trained and authorized police force for private purposes.

Petitioner applied to BYU as a graduate student and was required - like all applicants - to meet with his ecclesiastical

leader. Petitioner's ecclesiastical leader (Mr. Bramhall) happened to also be General Counsel for BYU. During the application process, Mr. Bramhall learned highly sensitive and stigmatizing information concerning Petitioner's alleged psychiatric history in another state prior to Petitioner seeking to enroll at BYU.

Mr. Bramhall learned that information in the course and scope of his duties as ecclesiastical leader. Mr. Bramhall then communicated that private information to other members of BYU's General Counsel (specifically to a Mr. Thomas).

Years later, Petitioner was involved in a civil rights action in federal court against BYU arising out of conduct of their police force, when Mr. Thomas revealed what he learned from Mr. Bramhall to another member of BYU General Counsel, Mr. Davis.

Mr. Davis then disclosed what he learned from Mr. Thomas in a court pleading in the federal court case. Specifically, Mr. Davis wrote that Petitioner had a "known ... psychiatric history" along with other allegations that Petitioner had previously been arrested.

Mr. Davis supported those allegations with no facts and Mr. Davis' assertions were completely irrelevant to the Motion (to Dismiss) as the judge would be limited to the facts of the complaint and not unsupported "facts" supplied Mr. Davis. Further, Mr. Davis supplied that information to counter the allegation that BYU police had a right to continually detain (unreasonable seizure) Petitioner on Campus. However, whether Petitioners had a psychiatric history or not or had previously been arrested, would not be relevant as either the BYU police had a basis to detain Petitioner based on objected observations or they didn't. Further, the FRE would likely have excluded that evidence on motion. Lastly, Petitioner

notes has never been convicted in any of the alluded to crimes, and except for one of those arrest, the arrest involved either BYU police (false arrest, which they admitted to) or former BYU police officers working for Provo city. None of the arrests ever went to trial. While having some tangential relation to the case, it had no bearing on the outcome of the case and Petitioner beleives that BYU interjected that information into the case to bias and influence the court in BYU's favor with extra-judicial information in the guise of "facts" supporting their case.

That petitioner had any type of alleged psychiatric history was no generally known to anyone except those working for BYU as it occurred years previous in another state. Because Plaintiff had never revealed that to anyone, he because suspicious as to how Mr. Davis learned the information, and a federal diversity action was instituted in September, 2002.

At a discovery hearing in 2003, the District Court Judge, without explanation and without any motion or showing from the defendants, denied Petitioner the opportunity to depose Mr. Thomas. Mr. Bramhall under oath stated he recalled nothing related to the matter, leaving only Mr. Davis to be deposed.

Petitioner had moved out of state to California and accurately informed the Court he was homeless and barely had enough money for food from day to day, and asked the judge if he could depose Mr. Davis by written depositions (Fed. R. Civ. Proc. 31) or by telephonic deposition (Fed. R. Civ. Proc. 30 (b)).

At the hearing the trial court asked the defendants how they would like Petitioner to conduct the depositions and the defendants stated they wanted the depositions to be conducted in person in Utah and so the court required Mr. Davis to be deposed in person in Utah, which essentially

doomed Petitioner's case as Petitioner had no financial means to travel to Utah to conduct the deposition and the court, without explanation, would not allow Mr. Thomas to be deposed.

Nonetheless, Petitioner attempted to save the needed money to travel (enough for one trip) to Utah for the deposition. Petitioner did have the money to travel to Utah but lacked the money for the complete return trip. Petitioner nonetheless would have gone to Utah to conduct the deposition but because BYU claimed attorney client privilege and notified Petitioner that they would no answer any meaningful questions posed to Mr. Davis, and because Mr. Davis unfortunately was out of town the day of the noticed deposition, Petitioner decided not to travel to Utah as there would be no one there to depose and if there had been, no meaningful questions would be answered due to the claiming of client-attorney privilege. Further, Petitioner needed to save the money for when he would travel back to Utah after he filed a motion to compel Mr. Davis' attendance at the deposition and to answer the question related to his communications with his fellow General Counsel members.

Prior to District court entering any Order on the Motion to Compel Discovery the discovery cutoff deadline passed.

Petitioner had also requested various documents in possession of BYU that would have definitively shown that Mr. Bramhall had in fact communicated the confidential information to Mr. Thomas, but BYU refused to cooperate in that discovery and those documents were not produced.

In the end, the District Court refused to required BYU to turn over any documents in the case, would not allow any telephonic depositions, and continued to deny Mr. Thomas' deposition and likewise refused to extend the discovery deadline.

With respect to the Separation of Church/State claim, none of the discovery which would have assisted in establishing that claim was produced by BYU, and the District Court otherwise refused any depositions of persons having any evidence in the case on that claim, and refused to compel BYU to turn over any documents in possession of their police which would have assisted Petitioner in establishing that claim.

The Court then allowed the BYU and Church Motion's for Summary Judgment and appeal was taken.

ARGUMENT
REASONS FOR GRANTING THE WRIT

I.
Erie Doctrine Violated

A. Federal Court Should Apply Federal Procedural Law In a Diversity Proceeding

The Erie Doctrine mandates that in diversity proceedings state substantive and federal procedural law be applied. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

It goes without argument that immunity with respect to conduct in a federal court proceeding must apply Federal, and not state judicial-proceeding privilege law.

However, the Tenth Circuit completely applied state judicial immunity law in concluding that BYU and Church deserved immunity for their disclosure in federal court of the information which Petitioner's ecclesiastical leader communicated to members of BYU General Counsel who then made that information public in the federal court proceeding. See Order (Appendix A) at 7,10.

Here, the Court of Appeals erred in applying "Utah's judicial-proceeding privilege" law to an action in federal court. Judicial proceeding privilege is procedural in nature.

With the Erie Doctrine violated, Petitioner shows that it was not harmless and that the Tenth Circuit could use some guidance on the scope of the judicial-proceeding privilege.

B. Judicial Proceeding Immunity in Federal Can Not Insulate a Party From a Tort Committed In Open Court or a Tort Previously Committed

Citing to Utah state law, the Tenth Circuit held that to "qualify for the privilege, the challenged statements "must be (1) made during or in the course of a judicial proceeding; (2) have some reference to the subject matter of the proceeding; and (3) be made by someone acting in the capacity of judge, juror, witness, litigant, or counsel." Citing to *DeBry v. Godbe*, 992 P.2d 979, 983 (Utah 1999). See *Order*, Appendix A, at 7.

The Utah case law cited by the Tenth Circuit fails to take into consideration whether or not the person receiving judicial immunity committed a tort or other violation of law in acquiring the information which they disclosed in court.

For example, if wire-tapping were not criminal, and only civilly actionable, and BYU wire-tapped Petitioner's conversation about some aspect of an upcoming court case against BYU on a BYU campus telephone and then counsel for BYU disclosed that information in a federal court proceeding to the public, the Tenth Circuit's holding[2] would

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[2] The in-court disclosure was held in-actionable (Id. at 7) and likewise the Breach of Confidence act which disclosed the confidential information was likewise held in-actionable by the Tenth Circuit (Id. at 10)(" The district court denied Mr. Raiser's

give BYU complete immunity for both the wire-tapping and the public disclosure of that information because it was (1) made during or in the course of a judicial proceeding; (2) had some reference to the subject matter of the proceeding; and (3) was made by someone acting in the capacity of judge, juror, witness, litigant, or counsel.

Thus, Utah case law is inadequate and an unjust outcome results from using Utah case law to determine a procedural matter in federal court.

The judicial-proceeding privilege has as its goal to provide the ability to adjudicate a dispute without a witness, judge, attorney or others who participate in the proceedings fear a defamation lawsuit with respect to their testimony or participation with respect to those proceedings. *Restatement Second of Torts* (1965-1977) § 585. To extend the privilege to give immunity to tortuous conduct is not proper.

Judicial immunity was critical in the case for both BYU and LDS Church as judicial immunity protected BYU's in court disclosure (*Order* at 7), was used as a basis to deny discovery in the case (*Order* at 10) and to deny the right to amend the complaint to add a cause of action for breach of confidence and breach of fiduciary duty against both BYU and LDS Church (*Order* at 10) which were critical to the outcome of the case.

An unlawful act is an unlawful act. Where information is obtained via unlawful means by a party to a federal court case, disclosure of the information can not be protected by federal judicial immunity and it can neither give immunity to the unlawful act by which the information was obtained.

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motion [to add a breach of confidence claim] as futile. We agree. Utah's judicial-proceeding privilege would apply to this claim.").

II.
A State Police Force Controlled by a Religious Institution Violates the Establishment Clause

A. Preliminary Matters

First, BYU is entirely owned, operated and controlled by the LDS church and its student body and faculty are about 98 % LDS. That BYU is a religious institution has never been disputed or challenged.

Second, as shown infra, BYU refused to turn over any documents in possession of their police department concerning Petitioner and the District Court refused to compel that discovery. Neither was discovery compelled with respect to the information in possession of the BYU police department. The District Court additionally refused to allow Petitioner any opportunity to depose anyone from the BYU police department or BYU administration with respect to how they use their police force and what information they exchange with them and school or church related matters.

The lack of Discovery was critical and needs pointing out. The Tenth Circuit for example states:

> Nothing in the record suggests that Mr. Raiser's injury from the alleged exchange of private information between BYU and its police force occurred because of any entanglement between government and religion. (emphasis added)

Order (App. A) at 8.

"Nothing in the record" resulted because the record was not permitted to be developed in this case due to lack of discovery in this case. Thus had proper discovery been allowed, Petitioner likely could have obtained the necessary supporting facts for the Establishment Clause claim. At least

Petitioner deserved a chance at developing the record on that claim.

Third, in arguing this matter before this Court, Petitioner is not saying BYU can not have a police force on its campus. For example there could be a BYU precinct which answers to either the Provo city police or perhaps the county sheriff. With some planning and care there would be little noticeable change in security or general operations, except the BYU police would ultimately answer to the state or city and not a church.

B. Article III Standing

The Tenth Circuit held Petitioner did not have standing to bring an establishment clause claim in upholding dismissal. *Id.* at 8. Although the Tenth Circuit found a cognizable injury was properly alleged (*Id.*), it held that the injury did not result from Church - State entanglement. *Id.* Thus the dismissal of the Establishment Clause claim depends on whether or not a religiously controlled institution operating their own state empowered police force constitutes a violation of the Establishment Clause of the First Amendment.

Petitioner alleged that BYU's use of its police force to obtain various pieces state controlled information – not all of which were publicly available[3] or accessible – to gain advantage in their court cases against Petitioner constituted an injury as the BYU police, as alleged by BYU, gave to BYU general counsel highly private and sensitive information which the BYU police had gained access to.

Not all police information is publicly available. Yet BYU has access to all of it automatically via their police. One point that might be missed is that one challenge to accessing

[3] Whether the information obtained is public is addressed fully infra.

police information is being aware of what information exists or is available. In other words, a citizen can not request something if they are unaware it exists. Yet BYU having free access to all police information and the state and federal databases which their state police have access to, gain significant advantage over the average citizen. Yet BYU is a religious organization.

Further, under Utah law, a police chief or officer has wide discretion in how police information is classified, and in turn who can access it.

For example, Utah Code 63-2-201(3)(a) states the "following records are not public: (a) a record that is private, controlled, or protected under Sections 63-2-302, 63-2-302.5, 63-2-303, and 63-2-304".

63-2-303 speaks of a governmental entity "reasonably" believing that the release of certain information would be "detrimental to the subject's mental health or to the safety of any individual". See Utah Code - 63-2-303(2).

That is extremely subjective. Where the only guidance is whether the decision maker "reasonably believes" the record should receive a certain protection, it is extremely discretionary and open to biases and prejudice etc.

What offers some tempering to the decision-making process is that the governmental entity is supposed to be making decisions for the good of the electorate. Ultimately, the executive branch answers to the electorate.

In BYU's case, they are the ones doing the classifying of their police information, and perhaps other police information, and further have full access to police records and other a lot of other state information that a common police department has access to, and likely (certainly BYU answering Appellant's discovery on the matter would have

been helpful) have much discretion as to how it is used and given out.

Yet BYU is not a governmental entity. BYU answers to the school president, a full time church leader who is appointed by the LDS church leadership. BYU police are hired, fired and financed by BYU. Thus if BYU wants or needs certain information there certainly exists pressure on the BYU police to give them what they want. Certainly, BYU police do not answer to a mayor or police chief appointed by an elected official like other police departments.

While no discovery was allowed into the matter, it appears that the information which the BYU police gave to its general counsel is on its face an internal-use document and would not be considered something publicly available. Thus BYU has free access to state police databases, reports, records and other information, including information on what is and what is not available on a given person. They have definite advantage over the average citizen who usually must get a court order for all but the most basic of police records, despite various open access laws.

The remainder of this section focuses on the legal aspects of the Establishment Clause to show that an establishment clause violation does in fact exist.

C. Conduct Does Violate Establishment Clause under Established Case Law From This Court

1. Lemon v. Kurtzman, 403 U.S. 602 (1971)

In *Lemon v. Kurtzman* a state statute giving state monetary aid to a religiously sponsored educational institution was challenged. The statute made every attempt to ensure that the money given to the school would be used solely for non-religious curriculum such as math etc.

The argument in favor of the validity of the state statute was that the state statute mandated that the money be used only for non-religious purposes and guidance was given on ensuring that goal. To the casual observer, no entanglement would be present as the money was used to buy only math books etc. which were non-religious in nature.

However, Church / State Entanglement was nonetheless found.

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Id. at 620.

In the instant appeal, state money for training police officers is spent, and perhaps of greater importance, important executive branch state authority is given to BYU when they are permitted to operate their own police force.

If "state police authority" is substituted for "state money" for a parochial school as in *Lemon v. Kurtzman*, the present appeal is almost analytically identical to *Lemon v. Kurtzman* on the Entanglement Clause issue.

In the present case, in order for the state of Utah to ensure that BYU uses state police power, authority and information for non-religious purposes or ends, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected." .

Here that "inspection" would necessarily have to reach the BYU administration and leadership to ensure that they also are only using that police power, authority and information for non-religious purposes.

Because the state of Utah must enact a continuing state program to oversee and ensure that BYU and its leadership use the state police force for non-religious purposes such contacts would, like in *Lemon v. Kurtzman*, involve excessive and enduring entanglement between state and church.

Typically, important executive branch state police power is overseen by a mayor/city council who answer directly to the people at election. Here, BYU has important police power and it is completely controlled by a religious organization.

2. Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)

Larkin also provides guidance in this appeal.

At issue in *Larkin* was a city ordinance which delegated to a church or school important discretionary legislative decision-making authority. That set up was found to violate the Establishment Clause.

In the instant matter, important executive branch state police is at issue. While police do have some training, regulations etc. to follow there is also within an officer authority significant discretionary power in how they go about applying and enforcing the law. This in turn leaves open the possibility of misusing that authority, however subtle, along religious lines or for religious purposes. Further, a police department has discretion on how they handle their information and who gains access to it, and how that information is classified under Utah law.

One state court analyzing the same issue before this Court held that an Establishment Clause violation exists where a religiously controlled university operates a state police force. See *State v. Jordan*, 574 S.E.2d 166 (N.C. App. Ct. 2002) (review denied, 356 N.C. 687, 578 S.E.2d 321 (2003)). *Jordan* analyzed the Establishment Clause issue under Lemon and found a violation. Likewise *Jordan* analyzed the facts and determined that state police authority is an important discretionary power under *Larkin* and also found a violation of the Establishment Clause under *Lemon v. Kurtzman*.

While the issue would need further developing at the District Court, Petitioner has shown that the issue has merit and deserves that opportunity. Certainly some discovery would be helpful.

There also appears to be a split between the highest court of a state and one of the Federal Circuits as the North Carolina Supreme Court denied review in *Jordan* holding that a religious university operating a police force violates the Establishment Clause and this case by the Tenth Circuit court of Appeal.

3. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994)

BYU admits that their police force was established and created by state statute (in 1972) where the state of Utah authorized all private universities in the state to operate their own state police force. By way of note, there are only 2 private universities in Utah (a state of about 2 million) large enough to maintain a private police force, one of them being BYU, the other, Westminster College, was founded by the Presbyterian faith.

The case of *Kiryas Joel* also provides guidance for this appeal. *Kiryas Joel* involved the state of New York enacting

a statute empowering the village of Kiryas Joel to run its own school district. The village of Kiryas Joel was formed by a religious group and was comprised solely by members of the same religious faith. The school district was created by state statute for the village to meet the special education needs of school children of the village to save time and expense in sending those children to a regular public school.

When the creation school district was challenged on Establishment clause grounds, church state entanglement was found. There are similarities to the instant appeal.

For example, this Court noted the wording of the state statute empowering the school district of Kiryas Joel which simply and noted

> Of course, Chapter 748 delegates power not by express reference to the religious belief of the Satmar community, but to residents of the "territory of the village of Kiryas Joel." 1989 N.Y.Laws, ch. 748. Thus the second (and arguably more important) distinction between this case and Larkin is the identification here of the group to exercise civil authority in terms not expressly religious. But our analysis does not end with the text of the statute at issue, see Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. ___, ___ (1993) (slip op., at 12); Wallace v. Jaffree, 472 U.S. 38, 56 -61 (1985); Gomillion v. Lightfoot, 364 U.S. 339, 341 -342 (1960), and the context here persuades us that Chapter 748 effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly.

BYU acknowledges that their police force was created by an act of the state legislature and although that state law creating the BYU police force does not explicitly state it is empowering a religious organization with state police authority, the effect of that statute is to create and empower a

religious institution with important state power and authority along religious lines. Because a state police force is an important government function, like a school board, the creation and operation of a state police force created by a neutral-language state statute should be found to violate the Establishment Clause.

4. Petitioner Also Has State Taxpayer Standing

For completeness, independent of the injury alleged in the complaint, Petitioner would still have standing as a state taxpayer to challenge the expenditure of state funds to train police for BYU and to accredit, monitor the BYU police force to ensure they do not use their state police force for private purposes.

In the same way a federal taxpayer has standing to challenge expenditure of federal taxes which are used in violation of the separation of state/church requirement (*Flast v. Cohen*, 392 U. S. 83), Petitioner as a state taxpayer, has standing to challenge the use of state tax funds to train BYU police officers and for state administrative costs to exercise state oversight of the BYU police force to ensure they to not use state police power for private purposes.

III.
Discovery Issues

Together with pretrial procedures, discovery ensures that trial is a fair contest in which the basic issues and facts are disclosed to the fullest extent practicable. *United States v Procter & Gamble Co*, 356 US 677 (1958).

The formulation of the discovery rules and the development of discovery procedure hasten the day when the outcome of litigation will depend less on the skill and strategic maneuvering of counsel and more on the merits of the case. *Teller v Montgomery Ward & Co*, 27 F.Supp 938,941 (D.Pa.

1939).

A. Telephonic Depositions Should be Permitted Where a Plaintiff Can Not Afford To Travel To Depose a Witness and would otherwise lose the case without the depositions where the defendant made no showing of prejudice.

Petitioner showed the District Court he did not have the financial means to depose Mr. Davis in person. The defendants made no showing how they would be prejudiced by a telephonic deposition of Mr. Davis. Mr. Bramhall and another ecclesiastical leader, Mr. Towsey, stated under oath they could remember nothing of the matter, leaving only Mr. Davis to depose, as those were, for no explained reason, the only witnesses the court would allow. Thus Mr. Davis' deposition was critical, especially because he submitted an affidavit stating he learned the confidential information solely from police files. While that testimony was later proven to be false, Mr. Davis' deposition was imperative.

Fed. R. Civ. Proc. 30(b)(7) permits telephonic depositions. All other Federal District Courts permit telephonic depsotions when the proper showing is made and the only a minimal showing is needed. See *Jahr v IU International Corp.*, 109 FRD 429 (MD NC, 1986); *Rehau, Inc. v Colortech, Inc.* 145 FRD 444 (WD Mich, 1993) (A movant must simply show a legitimate reason for taking a deposition telephonically, and should not be required to show extraordinary need.)

In the instant action, the judge's requirement that Petitioner travel to Utah for the deposition doomed the case and the outcome of the case was determined not on the merits but by the lack of financial means of the Petitioner.

Congress specifically provided for the opportunity to conduct a deposition telephonically in FRCP 30(b)(7) and where

Petitioner showed substantial need, and where the defendant made no showing of prejudice, the court should have allowed the telephonic deposition.

B. Denial of Mr. Thomas' Deposition a denial of due process of law - the witness around whom the case revolved

Mr. Thomas was the one to whom Mr. Bramhall disclosed the confidential information. Mr. Thomas works for BYU General Counsel. Mr. Bramhall stated he could not remember anything about the matter, so Mr. Thomas was the only witness in the case who would be able to testify whether Mr. Bramhall disclosed the confidential information. He would have been helpful to verify Mr. Davis' testimony as to what was disclosed to him by Mr.Thomas (See App. G at 3)(showing a conversation between Bramhall, Thomas then Thomas, Davis on the matter)(obviously, a deposition would be necessary to pin down exactly what happened). Yet the trial court specifically denied the opportunity, without explanation, and without any motion or showing by the defendant that Mr. Thomas should not be deposed.

The court stated:

> ALL YOUR DISCOVERY MUST BE COMPLETED NO LATER THAN JULY 19TH, 2005. THIS DISCOVERY WILL CONSIST ONLY OF THE DEPOSITIONS OF MR. DAVIS, THE DEPOSITION OF MR. BRAMHALL AND THE DEPOSITION OF DAN TOWSEY.

See App. D at 11.

Mr. Bramhall and Towsey stated in affidavits under oath that they could not remember details of the incident, leaving Mr. Davis as the entire witness for discovery in the entire case.

Where the only witness in the case having the information that a plaintiff needs to prevail in the case is forbidden to be

deposed, for no reason whatsoever, and where the defendant makes no showing why the witness should not be deposed, due process of law is denied and dismissal of the case should be vacated in order to allow proper discovery. See also Fed. R.Civ. Proc. 26(b)(1)(allowing for discovery of relevant material).

C. Due Process of Law is denied where the judge, without reason, or showing made by the defendant, denies discovery to a party until they specifically identify what discovery they need and from whom they need it.

In the present appeal, the trial judge also required Petitioner to make a showing prior to discovery being allowed. That is improper, especially where the defendant made no showing that any discovery limits should be imposed.

> **THE COURT:** *** THE PROBLEM IS I DON'T KNOW WHAT THAT DISCOVERY WOULD BE. I'M GOING TO ASK YOU NOW, PLAINTIFF, TO ADDRESS PRIMARILY THAT ISSUE AND ANY OTHER ISSUES THAT YOU WISH TO RAISE. BUT IF YOU WANT DISCOVERY, YOU'RE GOING TO HAVE TO TELL ME SPECIFICALLY WHAT KIND OF DISCOVERY AND FROM WHOM YOU BELIEVE WOULD BE NECESSARY.

See App. D at 4.

Petitioner does not believe that is proper. Nothing in Fed. R. Civ. Proc. 26(b) requires a litigant to "specifically" tell the judge what kind of discovery they want and "from whom" they need to get it from prior to being allowed to conduct discovery. Discovery oft times leads to discovery, and that other discovery can't be articulated to the judge, yet that other discovery is critical to the outcome of the case, yet its existence is can not be stated until some other preliminary discovery uncovers its existence.

Petitioner was, at the time of the hearing, unaware of the exact significance of Mr. Thomas and his role in receiving and communicating the confidential information to Mr. Davis as that information did not become available until after BYU responded to the first set of discovery, which they had not done at the time of the hearing.

Although Petitioner did in fact attempt to articulate why he needed discovery and generally from whom, such as other members of BYU General Counsel, the judge simply limited Petitioner's discovery to three depositions which doomed the entire case.

As Rule 26(b)(2) provides various reasons to limit discovery, but none of those reasons were presented, and for a judge sua sponte require a plaintiff to make a specific showing and from whom they need discovery prior to allowing it goes against FRCP 26 and the concept of due process of law.

D. **Due Process of Law is denied where the judge forbids a plaintiff access to Fed. R. Civ. Proc. 31, forbidding depositions by written questions, where the plaintiff did not have the financial means to conduct in-person depositions of the witnesses who lived in another state and as a result lost the case**

Fed. R. Civ. Proc. 31 unconditionally allows for the right to conduct dispositions. Yet the trial judge ordered the depositions to be done in person. See Hearing, App. D at 13:

THE COURT: *** NOW, ARE YOU SAYING THAT YOU WOULD DO THIS BY WRITTEN INTERROGATORY –

MR. ORTON [opposing counsel]: NO.

THE COURT:: – OR BY ORAL DEPOSITION?

MR. ORTON: ORAL DEPOSITION.

THE COURT:: I BELIEVE, PLAINTIFF, WE NEED TO DO IT BY ORAL DEPOSITION, WHICH WOULD REQUIRE THAT YOU TRAVEL HERE. ***

Petitioner/Plaintiff then informed the court he did not have the financial means to travel to Utah (Id. at 14), yet the court still forbid any access to Fed. R. Civ. Proc. 31. Further, for a judge to ask opposing counsel how the plaintiff should conduct a discovery of a witness is improper. A plaintiff should be able to conduct his discovery the way they see fit and if that results in an unfavorable outcome to the plaintiff, that is the plaintiff's fault, and not a concern for the court or opposing counsel.

Because Fed. R. Civ. Proc. 31 unconditionally allows for deposition by written questions, it was a denial of due process of law to forbid deposition by written questions, where Petitioner otherwise lost the case without the information which would have been gained from those depositions'.

E. Due Process of Law as embodied by the Federal Rules of Civil Procedure is violated where a federal judge allows a defendant to avoid discovery, not compelling disclosure of key documents and other discovery in possession of the defendant, which would show that the plaintiff would prevail in the case.

Petitioner sought key police documents in the case, interrogatories, requests for admissions, in addition to attempting to do the deposition of Mr. Davis. The information from that discovery would be critical to the outcome of the case.

Throughout discovery, BYU refused to supply the requested information as they claimed privilege. See Appendix G-K (claiming attorney client privilege for some 14 Interrogatories, 4 Requests for Admissions and avoiding

altogether 7 Production of Documents requests).

A typical example is found in Appellant's Discovery Set #8 (Appendix J). Appellant asked:

Request for Admission #1: Admit that Dave Thomas spoke to Eugene Bramhall about [Petitioner] prior to November 2, 2002.

Request for Admission #2: Admit that Dave Thomas spoke to Erik Davis about [Petitioner] prior to November 2, 2002.

Request for Admission #3: Admit that Dave Thomas was aware that [Petitioner] had an alleged psychiatric history/mental illness prior to November 2, 2002.

BYU Response to each: BYU objects to this as vague, ambiguous and overly broad. BYU further objects to this request of violative of the attorney-client and attorney work-product privilege.

Another example is Discovery Set #6 (Appendix I) which asked:

Interrogatory: 3. Has any current member of General Counsel's office (past or present until January 1, 2002), ever discussed [Petitioner] with Eugene Bramhall?

BYU Response: ... a current member of the Office of General Counsel has spoken to Eugene Bramhall as more specifically set forth below [#4]...

BYU Response to Interrogatory #4: ... Erik Davis has discussed [Petitioner] with Eugene Bramhall but did not learn of [Petitioner] 's psychiatric history from Mr. Bramhall. Mr. Davis learned of [Petitioner]'s psychiatric history/mental illness from the police records ...

But then see the supplemental responses BYU was Ordered

by the district court to produce (Appendix G) which shows BYU was not forthcoming in their above responses. Those responses show Mr. Thomas also spoke to Mr. Bramhall about Petitioner's alleged psychiatric history. Appendix G at 3-4 (showing Mr. Thomas spoke to Mr. Bramhall about Petitioner). Thus they are not forthcoming. They completely omitted that information in the above response to Interrogatory #4 and only after the discovery deadline passed and under court order would they make the disclosure that Mr. Thomas had also spoken to Mr. Bramhall about Petitioner 's psychiatric history.

Other important details about their response is that they state Mr. Davis learned of Petitioner's "mental illness" form the police records, but the police file says nothing of a mental illness. Mr. Bramhall however had such information, and then Mr. Davis has the same information after talking to Mr. Thomas who had spoken to Mr. Bramhall about the matter.

As for the BYU's claim of Client-Attorney Privilege, that privilege regarding the Bramhall - Thomas conversation(s) about Appellant was never shown to have occurred during the course of any legal representation of BYU. As for any of the conversations about Appellant between Bramhall and Thomas or Thomas and Davis, privilege could not apply bc because BYU made public the contents of those conversations when publishing it in a court document in case 2:02CV975.

Where the contents of an attorney-client conversation are disclosed, the privilege is lost. See Restatement (Third) of Law Governing Lawyers § 79 (2000); See also United States v. Jones, 696 F.2d 1069, 1072-73 (4th Cir.1982) (waiver by publishing lawyer's tax-law opinion in brochures); In re John Doe Corp., 675 F.2d 482, 488-89 (2d Cir.1982) (disclosing privileged material to independent accountant and to lawyer for third person); North Dakota ex rel. Olson v. Andrus, 581 F.2d 177, 180-81 (8th Cir.1978) (disclosure to single non-

privileged person).

Petitioner sought a document in possession of BYU which memorialized the conversation between Mr. Bramhall and Thomas about the confidential information concerning Petitioner which would have showed that the conversation did take place and what was disclosed. Yet when BYU refused to turn over any of that information, the court refused to compel its disclosure.

Discovery was critical to the outcome of the case as the trial court made the right to amend the complaint contingent upon discovering facts to support the amendments and with the proper causes of action added to the complaint the outcome would have been different as those causes of action were supported by the facts of the case, or at least indicted the need for further discovery. For example, the breach of privacy claim was denied as to LDS church because Mr. Bramhall only disclosed it to one other person and Utah law requires a disclosure to a large group of persons. Yet, the amended complaint sought to add a breach of confidence (a breach of privacy to only 1 person) and a breach of fiduciary duty claim, which would have been actionable on the facts alleged in the complaint.

In the instant action, the discovery rules which would have allowed Petitioner to gain access to the facts necessary to prevail on the merits were not followed.

IV.
Amendment of Pleadings

A. Due Process of law as embodied in Fed. R. Civ. Proc. 15 is violated where plaintiff files a motion to amend the complaint 3 months into the proceedings, and federal judge holds it in abeyance for 1 year, then after 1 year denies the motion to amend because after 1 year the right to amend is no longer automatic,

where the opportunity to amend the complaint was essential in order to prevail in the civil action?

In December 2004, 3 months after filing the complaint, Petitioner sought to amend the complaint to add a breach of confidence claim to the case, to supplement the breach of privacy claim. When LDS church questioned whether Utah recognized such a cause of action, Petitioner told the court he would also include a breach of fiduciary duty claim in the new proposed amended complaint. That was done in Petitioners Reply Brief for the Motion to Amend the Complaint. See App. E.

Had the motion to amend been permitted at that time, Petitioner would have included the breach of fiduciary duty claim in the new Complaint. Had the court required a second motion to amend to include the breach of fiduciary duty, another motion, at that time, would have been submitted and the new claim added to the case.

Yet the court held in abeyance the motion to amend the complaint pending discovery of facts necessary to support the new claims. See App. D at 17

At the hearing on April 19, 2005 the judge held the motion to amend the complaint in abeyance pending the discovery of supporting facts at discovery. The Motion to Amend the complaint was filed in December, 2004, 3 months into the case.

Then, after waiting almost 1 year, when ruling on the motion to amend the complaint, the trial court ruled that because "because the permissive period within which to amend the complaint has passed, the decision to grant leave is within the court's discretion." See App. B at 17. The trial court then denied the chance to amend the complaint to add a breach of

confidence claim[4]. However, they did not disclose that Petitioner also sought during the motion briefing, a cause of action for breach of fiduciary duty which was fully supported by the facts of the complaint.

THE COURT: *** I AM GOING TO HOLD IN ABEYANCE THE MOTION TO AMEND TO SOME DEGREE -- *** IF WE RESOLVE THE ISSUE OF ANY SORT OF COMMUNICATION, THAT WILL TAKE CARE OF VERY EASILY THE MOTION TO AMEND. OKAY?

App. D at 17.

Inclusion of the breach of fiduciary duty claim was critical for LDS Church as the Tenth Circuit upheld dismissal, the lack of discovery and denial of the motion to amend because the only claim was breach of privacy, which required disclosure to a large group of persons. Had the breach of fiduciary duty claim been included, the Tenth Circuit could not have upheld denial of discovery on the grounds of futility.

B. Fed. R. Civ. Proc. 15 is violated where plaintiff files a motion to amend the complaint and the judge makes the right to amend the complaint contingent upon discovering the facts needed to support the amendment of the complaint, and where the judge then disallows the needed discovery to find any facts to support the amendment of the complaint.

As previously shown, the district court disallowed the

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[4] The trial court, at the hearing, "recognized" that no breach of confidence cause of action existed in Utah (App. D at 17), based on LDS' Church's assertion that such a cause of action did not exist, Petitioner showed that such a cause of action did exist in Utah and the district court assumed that it did in its Order of Dismissal App. B at 18. The district court's finding that Petitioner did not allege facts to support the claim is incorrect as the Complaint fully alleged facts showing that Mr. Bramhall's disclosure to Mr. Thomas violated a duty of confidence and that such a duty was owed to Petitioner. The Tenth Circuit also assumed Breach of Confidence was a valid cause of action.

deposition the witness upon whom the entire outcome of the case depended – Mr. Thomas. The district court disallowed any depositions by written interrogatory of Mr. Davis, or by telephonic deposition when Petitioner showed he did not have the financial means for in in-person deposition. The district court allowed BYU to avoid numerous interrogatories, requests for admissions, and allowing them to not disclose key documents in possession of the BYU police or the document in possessions of BYU showing that Mr. Bramhall did disclose the information at issue to Mr. Thomas and to use attorney client privilege as a basis to not participate in the scheduled depositions of Mr. Davis, and to allow Mr. Davis to be out of town on the date of the noticed deposition.

Thus to disallow such important discovery and to then make amendment of the complaint, which was critical to the success of the case, contingent upon discovery (App. D at 17) of supporting facts goes to deny due process of law and the intent and purpose of the Federal Rules of Civil Procedure.

V.
Mr. Davis' Misrepresentations in Affidavit

The testimony of Mr. Davis (Appendix F) was critical (including a chance to depose him) as it was the only sworn witness testimony in the case and because Mr. Davis claimed that the police files were the source of his learning about Petitioner's alleged psychiatric history and that no other member of BYU General Counsel was the basis. BYU in Appendix G affirms that Mr.Davis "based his statement regarding Plaintiff's "known... psychiatric history" solely on his own examination of these records". (Appendix G) If that had been the case, the case on that claim would be doomed.

What is troubling however, is that Mr. Davis actually had two sources for his information on Petitioner's alleged "known" psychiatric history. Yet he claimed, under oath,

that there was only one. The second source was Mr.Thomas. In fact, Mr. Thomas as the first source of the information whereby Mr. Davis learned of the alleged psychiatric history. And Mr. Thomas disclosed that to Mr. Davis after speaking with Mr.Bramall about the matter. See Appendix G at 3.

Part of the problem though is Mr. Thomas was not permitted to be deposed and BYU only disclosed Mr. Davis had misrepresented under oath after the discovery deadline had passed and then only about 1 week prior to the hearing on summary judgment in the case when the court ordered their disclosure of that information.

The "police files" turned out to be an 8 word reference in a footnote in an unidentified police document. That footnote state a person assumed to be Petitioner "Walked away from Psychiatric Hospital in Columbus, OH." Mr. Davis stated that was his source for concluding in a court pleading - under FRCP 11 – that Petitioner had a "known" "psychiatric history". A close examination between the two calls into question whether that was the case.

Nothing in the police footnote (absent an assumption) states Petitioner had a "psychiatric" history. Petitioner could have, for example, walked away after visiting a friend at that hospital. Nothing indicates any "history", or something over a period of time. Nothing says - assuming it is all true - that it is "known" to anyone. No indication who the author was, who the source was, whether the author correctly understood and put into words what they apparently were reported. Yet Mr. Davis, without doing any further research he says, concluded to a level of certainty under FRCP 11 that what he alleged was true and accurate.

On the other had, Mr. Bramhall had extensive information on Petitioner's alleged psychiatric history, including information on whether or not he was taking medication, what the exact diagnosis's were and other related details. Based on what

Mr. Davis stated, Mr. Bramhall would be the logical source given the two options.

Because Mr. Davis stated under oath that the police footnote was the only source for his statement concerning Petitioner's alleged psychiatric history, stating no other member of BYU general counsel was a source, and because BYU under court order admitted there were actually two sources, one being Mr. Thomas of BYU general counsel, and because that was material to the case, Mr. Davis can be concluded to have misled the court and/or committed perjury in the case and where the proceedings are tainted by such dishonesty on a material issue of the case, the district court's dismissal of the case should be vacated or reversed.

VI.
CONCLUSION & RELIEF SOUGHT

Based on the foregoing, Due Process of Law as embodied in the Federal Rules of Civil Procedure was denied. Proper discovery rules and procedures were not followed and as a result the facts necessary to prevail in the case were lost.

The trial judge limited discovery to the deposition of only three witnesses in the case, without explanation or showing by the defendants as to why other depositions should not be had. None of those 3 depositions would cover any discovery for the Entanglement Clause claim.

The trial judge disallowed the deposition of the most important witness in the case and the only witness having the information Petitioner needed to prevail in the case.

The trial judge disallowed the deposition of the second most important witness in the case denying (1) any written depositions or (2) telephonic deposition when Petitioner showed he did not have means to travel to another state for deposition.

BYU refused to turn over any documents in possession of their police force. Those documents were critical in both the Entanglement Clause claim and the breach of privacy/confidence/fiduciary duty claims,. The district court would neither compel that disclosure.

BYU refused to turn over the document in their possession containing a record of the Bramhall-Thomas conversation where Mr. Bramhall disclosed the confidential information; the district court would not require its disclosure.

BYU claimed attorney client privilege surrounding the Bramhall-Thomas communications to avoid numerous discovery questions and to avoid answering key questions at the Davis deposition where such a privilege did not apply.

The court would not compel Mr. Davis' deposition or extend the discovery deadline to accommodate that deposition.

Petitioner has also shown that dismissal of the Establishment Clause claim was also improper, that some discovery on the claim should have been allowed and that applicable case law shows the existence of a valid claim.

Petitioner would simply ask that the case be remanded back to district court to allow fact finding via discovery, to have a chance to amend the complaint to include the breach of fiduciary duty claim, and to allow the facts and law regarding the Establishment Clause claim to be developed.

Respectfully Submitted,

s/_____

Aaron Raiser

Appendix A - United States Court of Appeals for the Tenth Circuit Order affirming Denial of Pseudonym. (See Petition for needed factual correction of the Order)

United States Court of Appeals,
Tenth Circuit.

Aaron RAISER, also known as T.G.,
Plaintiff-Appellant,
v.
CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS;
Brigham Young
University,
Defendants-Appellees.
No. 06-4066
January 10, 2007

Before KELLY, LUCERO, and HARTZ, Circuit Judges.

ORDER AND JUDGMENT [FN*]

FN*. After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

Harris L Hartz Circuit Judge

Aaron Raiser sued Brigham Young University (BYU) and the Church of Jesus Christ of Latter-Day Saints (the Church) after BYU stated in other litigation that he had a "known ... psychiatric history." R., Vol. 1, Doc. 9 (Ex. A at ii). The district court granted BYU and the Church summary judgment. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

BACKGROUND

According to his father, Mr. Raiser has been diagnosed as suffering from bipolar schizophrenia. His parents committed him to the Central Ohio Psychiatric Hospital for treatment in February 1991. But after several months he escaped and traveled to Provo, Utah.

In August 1991 the BYU police department received the following information regarding Mr. Raiser:

Walked away from Psychiatric Hospital in Columbus, OH. BYU grad and [returning missionary]; may find his way to [Salt Lake City] or Provo. Not dangerous, but peculiar behavior. Call parents Ed or Loraine, or sister Ginny [phone number omitted] if seen. Call collect; leave message.

Supp. R., Vol. 2, Doc. 152, Ex. A (Police Record at 4). Mr. Raiser's father testified that he or another family member probably supplied this information.

In January 1992 Mr. Raiser met with BYU General Counsel and Church Stake President, Eugene Bramhall, [FN1] "in order to obtain approval to attend BYU as a graduate student," id., Doc. 153, Ex. C (Aaron Raiser Aff. at 1). Three months later Bramhall sent BYU's admissions committee a conditional endorsement for Mr. Raiser's admission:

FN1. In the Church, a stake president presides over a group of wards. Scott v. Hammock, 870 P.2d 947, 949 n.1 (Utah

1994). Stake presidents "receive no formal educational training as clergymen, are not compensated by the Church, and perform their ecclesiastical duties in addition to their vocations." Id.

Aaron meets all of the usual admission standards. However, by personal observation, confirmed by his bishop [Dan Towsey] & family, it is apparent that he has an emotional or psychological deficit. I am also told, but have not personally verified that he has been hospitalized for schizophrenia & that he has something called a "sensory deficit" as well. I believe that he presently takes no medication for his condition. I believe that Aaron can benefit from intensive counseling, & that the possibility of his receiving important counseling is highest if he is admitted to the university.
Id., Vol. 2, Doc. 153, Ex. A. Mr. Raiser "was given approval to attend BYU." Id., Ex. C (Aaron Raiser Aff. at 1).
In July 1996, however, Mr. Raiser was "banned from campus," id. at 2, and was therefore unable to "attend church and church related activities on Sundays," id. at 3, because his student ward met on campus. He appealed to the chairman of BYU's access committee, Dave Thomas, who also worked in BYU's Office of General Counsel. After purportedly discussing the matter with Bramhall, as urged by Mr. Raiser, Thomas gave Mr. Raiser permission to attend church on campus.

In 2002 Mr. Raiser sued BYU pro se in federal district court, alleging that he had been abused and mistreated by campus police. See Raiser v. Brigham Young Univ., No. 2:02-cv-975 (D.Utah) (Am. Compl. at 3) (Raiser I). In a motion to dismiss the complaint, the assistant general counsel for BYU, Erik Davis, wrote the following passage, which spawned the present litigation:

Mr. Raiser has an extensive history of encounters with the

> Police.... Most of the ... encounters with Mr. Raiser have been in response to calls from concerned students or faculty members who have felt threatened or uneasy because of Mr. Raiser's presence on campus at unusual times and places and/or his bizarre or suspicious behavior and appearance.... These incidents and the circumstances surrounding them have justifiably caused BYU Police officers to treat Mr. Raiser with a certain amount of caution, but their actions towards Mr. Raiser have in all ways been reasonable and justified in light of Mr. Raiser's suspicious and bizarre behavior and his known ... psychiatric history.
> R., Vol. 1, Doc. 9, Ex. A (Mem. in Support of Mot. to Dismiss at i-ii) (emphasis added).

In September 2004 Mr. Raiser, again acting pro se, filed this suit against BYU and the Church in federal district court in Utah, claiming that they had maliciously and falsely asserted that he had a "known ... psychiatric history." R., Vol. 1, Doc. 1 (Compl. at 2); id., Doc. 65 (Am. Compl. at 3). Mr. Raiser alleged (1) that Bishop Towsey had told Bramhall that "Plaintiff had been institutionalized in another state and declared incompetent." R., Vol. 1, Doc. 1 (Compl. at 2) (internal quotation marks omitted); id., Doc. 65 (Am. Compl. at 2) (internal quotation marks omitted); (2) that "[t]his information, that Plaintiff had a psychiatric history was in turn communicated to others of the general counsel staff," and then published in support of the motion to dismiss. R., Vol. 1, Doc. 1 (Compl. at 2); id., Doc. 65 (Am. Compl. at 3); (3) that "information that Plaintiff had been institutionalized could have come from the [BYU] police department," R., Vol. 1, Doc. 1 (Compl. at 3); id., Doc. 65 (Am. Compl. at 3); and (4) that Bramhall "communicated the information that Plaintiff was institutionalized to the police," R., Vol. 1, Doc. 1 (Compl. at 4); id., Doc. 65 (Am. Compl. at 4). Mr. Raiser pleaded claims for breach of privacy, defamation, "False Light," "Violation of Separation of Church State," and "Violation of American's with [D]isabilities Act." R., Vol. 1,

Doc. 1 (Compl. at 5-8).

In December 2004 the Church moved for summary judgment. Later that month Mr. Raiser moved to amend his complaint to add a claim for breach of confidence. In April 2005 the district court denied the Church's summary-judgment motion without prejudice, extended the deadline for discovery to July 19, 2005, and authorized Mr. Raiser to depose Davis, Bramhall, and Towsey. The district court also ordered that the motion to amend be held in abeyance pending the resolution of discovery and summary-judgment issues.

In June 2005 Mr. Raiser filed another motion to amend the complaint. He stated that "[t]he new proposed Complaint ... is essentially the same as the first except that it removes two causes of action [defamation and false light] and simplifies the fact allegations." R., Vol. 1, Doc. 65 (Mot. at 1). The district court granted the motion, noting that "[t]he amended complaint is essentially a streamlined replica of the old complaint." Supp. R., Vol. 3, Doc. 210 (Order at 10).

On July 26, 2005, after the discovery deadline had passed without Mr. Raiser's having conducted any depositions, the Church renewed its summary-judgment motion. BYU also moved for summary judgment. In February 2006 the district court granted the motions, ruling that (1) Mr. Raiser's privacy claim against the Church failed because there was no evidence that the Church disclosed any private information to the public; (2) Mr. Raiser's privacy claim against BYU was barred by the judicial-proceeding privilege; (3) Mr. Raiser lacked standing to sue BYU under the First Amendment; and (4) Mr. Raiser had withdrawn his ADA claim. The district court also denied Mr. Raiser's December 2004 motion to amend, which had been held in abeyance. Mr. Raiser appealed.

DISCUSSION

I. Summary Judgment

We review de novo the district court's grant of summary

judgment. Stover v. Martinez, 382 F.3d 1064, 1070 (10th Cir.2004). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In conducting our analysis, we view all the facts in the light most favorable to the party opposing summary judgment and draw all reasonable inferences from the record in that party's favor. Stover, 382 F.3d at 1070. But while the burden of showing the absence of a genuine issue of material fact rests with the party seeking summary judgment, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1084 (10th Cir.2006) (internal quotation marks omitted). The opposing party must "make[ ] a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. (internal quotation marks omitted).

A. Breach of Privacy

Mr. Raiser's privacy claim appears to be premised on the public disclosure of an embarrassing private fact. See Shattuck-Owen v. Snowbird Corp., 16 P.3d 555, 558 (Utah 2000) (addressing an invasion-of-privacy claim against an employer who allowed numerous people to view a surveillance video of the employee-plaintiff's sexual assault). Regarding the Church's liability on this claim, there is no dispute that the disclosure about Mr. Raiser's "known ... psychiatric history" was not made by the Church, but by Erik Davis, a BYU attorney. Mr. Raiser speculates about a number of other possible disclosures by people affiliated with the Church, but all the alleged disclosures were private conversations, with the possible exception of the disclosures of information to the police. Mr. Raiser's father, however, testified that the likely source of the information received by the police was Mr. Raiser's family, and there is no contrary

evidence. A viable privacy claim requires a disclosure "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Id. at 558 (internal quotation marks omitted). As a matter of law these alleged disclosures were too limited to be considered public.

As for BYU, its disclosure in a court pleading that Mr. Raiser has a "known ... psychiatric history" was protected by Utah's judicial-proceeding privilege. To qualify for the privilege, the challenged statements "must be (1) made during or in the course of a judicial proceeding; (2) have some reference to the subject matter of the proceeding; and (3) be made by someone acting in the capacity of judge, juror, witness, litigant, or counsel." DeBry v. Godbe, 992 P.2d 979, 983 (Utah 1999) (internal quotation marks omitted); see also Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 906 n.37 (Utah 1992) (extending the privilege to invasion-of-privacy claims). The statement concerning Mr. Raiser's mental health was relevant to Mr. Raiser's claim in Raiser I that the police had abused and mistreated him.
Mr. Raiser appears to seek an exception to the judicial-proceeding privilege when the district court has neither sealed nor conducted an in camera review of a document before allowing "a disclosure of highly sensitive information obtained through an unlawful act." Aplt. Br. at 43. But he cites no authority for the proposition, nor are we aware of any. See Rios v. Ziglar, 398 F.3d 1201, 1206 n.3 (10th Cir.2005) ("To make a sufficient argument on appeal, a party must advance a reasoned argument ... and it must support its argument with legal authority." (internal citation omitted)).
To the extent that Mr. Raiser is claiming that BYU made other disclosures, none were public, so there would be no liability. See Shattuck-Owen, 16 P.3d at 558. We conclude that the district court did not err in granting summary judgment on Mr. Raiser's privacy claims.

B. Establishment Clause

The First Amendment's Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. I. This proscription applies to the States via the Fourteenth Amendment. See Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). An Establishment Clause violation occurs if (1) the challenged government action lacks a secular purpose; (2) the action's principal or primary effect advances or inhibits religion; or (3) the action fosters an excessive governmental entanglement with religion. Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1259 (10th Cir.2005). Mr. Raiser's claim is of the excessive-entanglement variety. He alleged that the "[state] statute ... which allows [BYU] to maintain a state empowered police force ... fosters an excessive governmental entanglement with religion," and that "[t]he state/church entanglement has injured Plaintiff ... [by] allow[ing] private information concerning Plaintiff to be exchanged between [BYU] and its police." R., Vol. 1, Doc. 1 (Compl. at 8, ¶¶ 67, 71); id., Doc. 65 (Am. Compl. at 5, ¶¶ 45, 49).

To have standing to assert an Establishment Clause violation, Mr. Raiser "must allege personal injury fairly traceable to [BYU's] allegedly unlawful conduct and likely to be redressed by the requested relief." O'Connor v. Washburn Univ., 416 F.3d 1216, 1222 (10th Cir.2005) (emphasis omitted), cert. denied, 126 S.Ct. 1469 (2006). Conducting de novo review, see Raiser v. United States, 325 F.3d 1182, 1183 (10th Cir.2002), we agree with the district court that Mr. Raiser lacks standing. Nothing in the record suggests that Mr. Raiser's injury from the alleged exchange of private information between BYU and its police force occurred because of any entanglement between government and religion. As far as this case is concerned, the relationship between BYU and its police force was indistinguishable from that between a secular private university and its police force. There was simply no religious component to the police force's conduct. Mr. Raiser's argument amounts to saying that

liability arises under the Establishment Clause for any conduct by the police force of a university controlled by a religious denomination.

Mr. Raiser argues that nevertheless the district court could not rule that he lacked standing, because "BYU never challenged injury due to excessive entanglement." Aplt. Br. at 46. But even if a defendant fails to raise any standing defense, the federal courts must still consider the issue of standing sua sponte to ensure that there is subject-matter jurisdiction. United States v. Colo. Sup.Ct., 87 F.3d 1161, 1166 (10th Cir.1996). Mr. Raiser also asserts that "BYU [h]as [a]dmitted [a]n Establishment Clause [v]iolation." Aplt. Br. at 48. But we find no support in the record for that assertion. Of course, we would remand to the district court to consider a standing argument raised for the first time on appeal if the plaintiff had been deprived of the opportunity to marshall evidence that would support standing; but Mr. Raiser does not suggest what possible evidence he could add on this matter if given an opportunity.

We conclude that the district court properly ruled that Mr. Raiser lacked standing to proceed under the Establishment Clause.

II. Discovery

Mr. Raiser appears to argue that summary judgment was inappropriate because he was hampered in his discovery efforts by the district court, BYU, and the Church. We review discovery rulings for an abuse of discretion. See Champagne Metals, 458 F.3d at 1082 n.7.

Among other things, Mr. Raiser claims that (1) he was denied the opportunity to depose Davis by telephone; (2) he was not allowed to reschedule Davis's deposition; (3) he was denied any opportunity to depose Thomas; (4) the district court found that "BYU was not being cooperative, but only required them to answer 2 of the Interrogatories," Aplt. Br. at 18, which were not signed by an attorney of record, id. at 34;

(5) the district court would not require BYU to produce the "Access Committee notes regarding the Bramhall- Thomas conversations," id. at 19; and (6) BYU failed to answer various discovery requests. But even if these claims were valid, the alleged errors did not affect the outcome of the case. None of the discovery sought would render public any disclosure by the Church or undermine BYU's judicial-proceeding privilege. Accordingly, we reject Mr. Raiser's discovery argument as moot. Cf. Kirkland v. St. Vrain Valley Sch. Dist. No. Re-1J, 464 F.3d 1182, 1197 (2006) (discovery dispute moot because the defendants were entitled to qualified immunity in any event).

III. Pleading Amendment

Mr. Raiser argues that the district court erred in denying his motion to add a breach-of-confidence claim to the complaint. We review for an abuse of discretion the denial of a motion to amend the complaint. E.SPIRE Comm., Inc. v. N.M. Pub. Regulation Comm'n, 392 F.3d 1204, 1211 (10th Cir.2004). "A court properly may deny a motion for leave to amend as futile when the proposed amended complaint would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment." Id. (internal quotation marks omitted).

The district court denied Mr. Raiser's motion as futile. We agree. Utah's judicial-proceeding privilege would apply to this claim. See Russell, 842 P.2d at 906 n.37. And communications within the BYU administration would not have breached any promise of confidentiality.

IV. Use of a Pseudonym

Finally, Mr. Raiser challenges the district court's denial of his motion for sanctions against the Church for revealing his identity while his motion to use a pseudonym was still under consideration. The district court ultimately denied Mr. Raiser's motion to use a pseudonym, and another panel of this court affirmed, observing that Raiser I also included an

unsuccessful interlocutory appeal on the pseudonym issue, and that afterward Mr. Raiser's identity remained in the public domain in connection with the litigation. See Raiser v. Church of Jesus Christ of Latter-Day Saints, 182 F. App'x 810, 811 (10th Cir.2006). The district court did not abuse its discretion in denying the motion for sanctions. See Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1243 (10th Cir.2006) ("[W]e review a district court's decision whether or not to impose sanctions ... for an abuse of discretion.").
The judgment of the district court is AFFIRMED. [FN2]

FN2. Mr. Raiser's motions to strike and for the same panel to hear this appeal and appeal No. 06-4116 are denied. Mr. Raiser's motions for an extension of time, for "Actual Justices [to] Decide the Above Motions," and for a panel member to draft the disposition are denied as moot.

Entered for the Court

Appendix B - United States District Court For The District of Utah Order Dismissing Case (Doc. 215)

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

ORDER
Case No. 2:04 CV 896 TC

In September 1994, pro se Plaintiff Aaron Raiser filed suit against Defendants The Church of Jesus Christ of Latter-Day Saints (LDS Church) and Brigham Young University (BYU). After months of procedural wrangling, court rulings, and concessions by Mr. Raiser, the number of Mr. Raiser's multiple claims against the Defendants has been reduced. Against the LDS Church, he now asserts one claim: breach of privacy (a tort). Against BYU, he now asserts two claims: breach of privacy, and a 42 U.S.C. § 1983 claim for violation of the constitutional separation of church and state.

The following motions are currently before the court:
(1) Defendant LDS Church's Renewed Motion for Summary Judgment (Dkt # 115);
(2) Defendant BYU's Motion for Summary Judgment (Dkt # 189);
(3) Defendant LDS Church's Motion for Discovery Sanctions

(requesting dismissal and attorneys' fees) (Dkt # 52);

(4) Defendant BYU's Motion for Discovery Sanctions (requesting dismissal and attorneys' fees) (Dkt # 59) (and joining in LDS Church's Motion for Discovery Sanctions);
(5) Plaintiff Aaron Raiser's Rule 60 Motion (Dkt # 122) for Relief from Order dated 4/26/05 (Dkt # 35) and related Motion for Sanctions (Dkt # 121); * [FN1]
(6) Plaintiff Aaron Raiser's motion for leave to amend the Complaint (Dkt # 13);
(7) Defendant BYU's Motion for Permanent Injunction Against Aaron Raiser as a Vexatious Litigant (Dkt # 134) (the LDS Church joins in this motion – see Dkt # 144); and
(8) Defendant BYU's Motion to Strike Plaintiff's Response to Motion to Hold Plaintiff as a Vexatious Litigant (Dkt # 184).

Having fully considered the motions and all related filings, arguments of the parties, and the governing law, the court finds, for the reasons set forth below, that the Defendants are entitled to summary judgment but not to their requested discovery sanctions. Mr. Raiser's motion for relief from the court's April 26, 2005 Order is denied because the transcript of the April 19, 2005 hearing demonstrates that the court's April 26, 2005 Order correctly reflected the court's ruling at the hearing. Mr. Raiser's related motion for sanctions is denied for the same reason. Mr. Raiser's motion for leave to amend the complaint is denied because the proposed amendment would be futile. The court denies the Defendants'

[FN1]
Mr. Raiser's motion for leave to amend his complaint was held in abeyance during the court's April 19, 2005 hearing on various motions, "pending the completion of discovery and resolution of any renewed Motion for Summary Judgment." (Apr. 26, 2005 Order (Dkt # 35) at 4.)

vexatious litigant motions without prejudice but forwards the papers associated with the motions to Chief Judge Dee Benson, who has authority to grant such relief, with the recommendation that Mr. Raiser be placed on the restricted filer list. Finally, BYU's Motion to Strike is denied as moot.

PROCEDURAL BACKGROUND

Mr. Raiser filed this pro se action against the LDS Church and BYU on September 23, 2004. BYU is a private university, sponsored by the LDS Church. Mr. Raiser asserts, among other things, a breach of privacy claim arising out of a 2002 disclosure of his "known . . . psychiatric history" in a court document in an unrelated case.

On December 8, 2004, the LDS Church filed a motion for summary judgment. In response, Mr. Raiser filed a Rule 56(f) motion for discovery. On April 19, 2005, the court granted Mr. Raiser's 56(f) motion and denied the LDS Church's motion for summary judgment without prejudice. (See Transcript of Apr. 19, 2005 Hearing (Dkt # 42).) The court gave the LDS Church permission to renew its motion after completion of the ordered discovery. Setting a discovery deadline of July 19, 2005, the court allowed limited discovery based on terms set forth in the April 26, 2005 Order (Dkt # 35). Mr. Raiser was given permission to depose Dan Towsey, Eugene Bramhall and Erik Davis. Even though Mr. Raiser had the opportunity to depose these key witnesses, he did not take advantage of that opportunity. (See Apr. 26, 2005 Order (Dkt # 35); Transcript of Apr. 19, 2005 Hearing (Dkt # 42); Nov. 2, 2005 Mem. Decision & Order of Mag. J. Brooke Wells (Dkt # 210) at 14-15.) After the discovery deadline passed, the LDS Church renewed its motion for summary judgment (currently pending before the court) and BYU submitted its own motion for summary

judgment.

Mr. Raiser complains that his efforts to conduct discovery were thwarted by the Defendants. He filed many motions challenging the discovery process (e.g., motions to compel, motions to extend the discovery deadline, and motion to take deposition by telephone), all of which were resolved by Magistrate Judge Brooke Wells in her November 2, 2005 Memorandum

Decision and Order (Dkt # 210). In the Order, Magistrate Judge Wells denied many of his requests.
Mr. Raiser's complaints about his inability to obtain the proper discovery have been dealt with fairly by the Magistrate Judge. Moreover, Mr. Raiser did not appeal the magistrate judge's November 2, 2005 Order, and so the Order stands. The fact that Mr. Raiser is proceeding pro se does not excuse his obligation to comply with the requirements of federal procedural law. See Ogden v. San Juan County, 32 F.3d 452, 455 (10th Cir. 1994). Accordingly, the court proceeds to the merits of the case.

FACTUAL BACKGROUND [*FN2]
Mr. Raiser, apparently a member of the LDS Church, alleges that his former ecclesiastical leaders — his former bishop Dan Towsey and his former stake president [*FN3] Eugene Bramhall disclosed to BYU's General Counsel staff that Mr. Raiser had been declared mentally incompetent and had been

[FN2] There are no genuine disputes of material fact.
[FN3] "In the LDS Church, a bishop is the ecclesiastical leader of a local congregation called a 'ward.' A group of wards make up a 'stake,' which is headed by a stake president." Scott v. Hammock, 870 P.2d 947, 949 n.1 (Utah 1994). (See also Aff. of Dan J. Towsey in Supp. Of Def.'s Mot. for Summ. J. ¶¶ 2-3, attached as Ex. D to Mem. Supp. Def. Church's Renewed Mot. Summ. J.) institutionalized for

a mental illness. He then alleges that such information was publicly disclosed in 2002 in court papers written and filed by BYU's counsel in a separate case.

Specifically, on November 4, 2002, counsel for BYU filed a Memorandum in Support of a Motion to Dismiss (hereinafter "BYU Memorandum") in the separate, unrelated case of Raiser v. Brigham Young University, United States District Court for the District of Utah, Case No. Case 2:04-cv-00896-2:02-CV-975-TC. In that case, Mr. Raiser alleged multiple acts of misconduct against BYU's police force, among other things. (See Compl. ¶¶ 113-177, Case No. 2:02-CV-975-TC, D. Utah, Dkt # 1.)

The BYU Memorandum included the statement that Mr. Raiser had a "known . . .psychiatric history." (Ex. B to Mem. Supp. Def. Church's Renewed Mot. Summ. J. at ii.) Specifically, the language in question appeared in the following paragraph: Mr. Raiser has an extensive history of encounters with the Police Departments of both Provo City and [BYU]. Most of the BYU Police Department's encounters with Mr. Raiser have been in response to calls from concerned students or faculty members who have felt threatened or uneasy because of Mr. Raiser's presence on campus at unusual times and places and/or his bizarre or suspicious behavior and appearance. Mr. Raiser has also been involved in a number of criminal incidents with officers of the Provo and BYU Police Departments, including arrests for criminal trespass, disorderly conduct, lewdness, and lewdness involving a child. These incidents and the circumstances surrounding them have justifiably caused BYU Police officers to treat Mr. Raiser with a certain amount of caution, but their actions towards Mr. Raiser have in all ways been reasonable and justified in light of Mr. Raiser's suspicious and bizarre behavior and his known criminal and psychiatric history. (Id. at i-ii (citation omitted; emphasis added).) This alleged breach of privacy has given rise to

the action currently before the court. Mr. Raiser's former bishop, Dan Towsey, testifies in his affidavit that he has no recollection of ever knowing that Mr. Raiser had been declared incompetent or ever been institutionalized, and no recollection of ever disclosing such information to any person. (Aff. Of Dan J. Towsey in Supp. of Def.'s Mot. for Summ. J. [hereinafter "Towsey Aff."] ¶ 7, attached as Ex. D to Mem. Supp. Def. Church's Renewed Mot. Summ. J.) Similarly, former Stake President Eugene Bramhall testifies in his affidavit that he has no recollection of ever being informed by Mr. Towsey or any other person that Mr. Raiser was declared incompetent or institutionalized, that even if he had the information he has no recollection of ever disclosing such information to any other person, and that he had no involvement in the preparation or filing of the November 2002 BYU memorandum about which Mr. Raiser complains (Mr. Bramhall also served as BYU's General Counsel, but he retired in October 2000). (Aff. of Eugene H. Bramhall in Supp. of Def.'s Mot. for Summ. J. [hereinafter "Bramhall Aff."] ¶¶ 2, 4-7, attached as Ex. E to Mem. in Supp. of Def. Church's Renewed Mot. Summ. J.) And the BYU attorney who wrote the November 2002 BYU Memorandum says that the information included in the memorandum did not come from Mr. Towsey, Mr. Bramhall or the LDS Church but rather from the BYU Police Department files. (Aff. of Erik G. Davis in Supp. of Def.'s Mot. for Summ. J. [hereinafter "Davis Aff."] ¶¶ 4-5, attached as Ex. C to Mem. in Supp. of Def. Church's Renewed Mot. Summ. J.) Indeed, the record before the court shows an August 6, 1991 comment in the BYU police department file concerning Mr. Raiser:

> 08/06/91 - Walked away from Psychiatric Hospital in Columbus, OH. BYU grad and RM; may find his way to SLC or Provo. Not dangerous, but peculiar behavior. Call parents Ed or Loraine, or sister Ginny [telephone number omitted] if seen. Call collect; leave message.

(BYU Police Department Intelligence Report, attached as Ex.

B to Pl.'s Response to Renewed Mot. Summ. J.)
Mr. Raiser presented a document to the court in which Eugene Bramhall, on April 27, 1992, made the following statement to the BYU Admissions Office in his role as an LDS Church stake president:
Aaron meets all of the usual admission standards. However, by personal observation, confirmed by his bishop & family, it is apparent that he has an emotional or psychological deficit. I am also told, but have not personally verified that he has been hospitalized for schizophrenia & that he has something

[FN4] Mr. Raiser objects to this evidence presented by BYU in the form of supplemental responses to interrogatories. (See Pl.'s Response to BYU's Mot. Summ. J. at 15-16; BYU's Supplemental and Am. Responses to Pl.'s Request for Discovery #3 (Interrogatory Numbers 8 and 10), attached as Ex. 1 to BYU's Reply Mem. Supp. Mot. Summ. J.) Specifically, Mr. Raiser objected on the basis that the responses were not certified according to the requirements set forth in Fed. R. Civ. P. 26(g). The court declines to grant Mr. Raiser's apparent request to disregard the interrogatory responses.

called a "sensory deficit" as well. I believe that he presently takes no medication for his condition. I believe that Aaron can benefit from intensive counseling, & that the possibility of his receiving [illegible] counseling is highest if he is admitted to the University. (Eugene Bramhall's confidential written statement to BYU Admissions Office, attached as Ex. A to Pl.'s Response to Renewed Mot. Summ. J.)

Mr. Raiser also emphasizes an event that occurred in August 1996, when Mr. Raiser was denied access to the BYU campus. He appealed that decision to BYU's Access Committee, which was then chaired by Dave Thomas, a member of the BYU General Counsel's office. Mr. Raiser spoke with Mr. Thomas at that time and requested that

Mr. Thomas talk to Eugene Bramhall "to see if that would help." (See Pl.'s Response to Renewed Mot. Summ. J. [hereinafter "Pl.'s Opp'n Mem."] at 5-6; Fourth Decl. of Pl., attached as Ex. C to Pl.'s Opp'n Mem.)

Even if the record did contain any admissible evidence that Mr. Thomas spoke to Mr. Bramhall regarding Mr. Raiser, the undisputed record shows that Mr. Thomas first learned of Mr. Raiser's psychiatric history from BYU Police who told Mr. Thomas that Mr. Raiser had "walked away" from a psychiatric facility. Mr. Thomas mentioned this to Mr. Davis. [*FN4] Mr. Davis then reviewed the BYU Police records and based his statement regarding Mr. Raiser's "known . . . psychiatric history" solely on his own examination of these records, specifically the 1991 comment contained in those records. There is no evidence that Mr. Bramhall disclosed to Mr. Thomas, the BYU police department, or BYU's general counsel staff the information he apparently had in 1992.

ANALYSIS

The Defendants' Motions for Summary Judgment

Legal Standard Federal Rule of Civil Procedure 56 permits the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The court must "examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990).

But summary judgment should be granted if the plaintiff, who bears the burden of proof, lacks the evidence necessary to support one or more elements of his claims. See Celotex

Corp. v. Catrett, 477 U.S. 317, 323 (1986) ("[W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim."). And the non-moving party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Fed. R. Civ. P. 56(e).

LDS Church's Motion for Summary Judgment Mr. Raiser's only claim against the LDS Church is a breach of privacy claim. Although Mr. Raiser does not identify a specific privacy tort, the nature of the claim appears to be the public disclosure of an embarrassing private fact, specifically, that Mr. Raiser has a psychiatric history. To succeed on a claim of invasion of privacy, Mr. Raiser must establish the following:

"(1) the disclosure of the private facts must be a public disclosure and not a private one; (2) the facts disclosed to the public must be private facts, and not public ones; and (3) the matter made public must be one that would be highly offensive and objectionable to a reasonable person of ordinary sensibilities." Stien v. Marriott Ownership Resorts, 944 P.2d 374, 380 (Utah Ct. App. 1997), cited with approval in Shattuck-Owen v. Snowbird Corp., 16 P.3d 555 (Utah 2000) (adopting elements announced in Stien).

The LDS Church contends that it is entitled to summary judgment because there is no evidence of any public disclosure by the Church, and the information that was ultimately disclosed (although not by the Church) was not highly offensive and objectionable. The LDS Church also raises defenses invoking the judicial proceeding privilege and

the statute of limitations bar.

The court finds that there is no evidence of any public disclosure by the LDS Church. Accordingly, Mr. Raiser's breach of privacy claim fails as a matter of law. The undisputed facts show that Mr. Davis, who authored the brief disclosing Mr. Raiser's "known . . . psychiatric history," obtained his information from the BYU police department files, not from Mr. Bramhall,

[FN5] The court is not persuaded by Mr. Raiser's argument that the 1991 comment did not contain enough information to supply Mr. Davis's information or support Mr. Davis's interpretation of the information.

Mr. Towsey, or any other representative of the LDS Church. The fact that Mr. Bramhall knew something about Mr. Raiser's psychiatric history in 1992 and revealed that in a confidential 1992 written statement to the BYU admissions office does not contradict Mr. Davis's sworn testimony regarding his source for the information (BYU police department files). [*FN5] Nor does it support a finding that Mr. Bramhall made any public disclosure of Mr. Raiser's sensitive personal information. Under Utah law, a "public disclosure" for purposes of the invasion of privacy tort "'means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.'" Shattuck-Owen, 16 P.3d at 558 (quoting Restatement (Second) of Torts § 652D cmt. a (1977)). Mr. Bramhall's statement to the BYU Admissions Office does not fall within the legal definition of public disclosure.

And Mr. Raiser has failed to present any evidence of any other disclosure by a representative of the LDS Church. The fact that BYU counsel made a disclosure in a public court document does not implicate the LDS Church, which is an

entity entirely separate from BYU. Also, Mr. Raiser presents nothing more than unsupported inferences that, in 1996 when Mr. Raiser was denied access to the BYU campus, Mr. Thomas (chair of the BYU Access Committee) spoke to Mr. Bramhall about Mr. Raiser (at Mr. Raiser's request) and that Mr. Bramhall then revealed information to Mr. Thomas regarding Mr. Raiser's psychiatric history.

The court declines to make such an inference. [*FN6] Even if the court found such an inference valid, such a finding does not dispute the fact that Mr. Davis's sole source for the information was a BYU police department report (which reports are public record) [*FN7], nor does it establish that any alleged disclosure by the LDS Church was public. [*FN 8] For the foregoing reasons, the LDS Church is entitled to summary judgment.

BYU's Motion for Summary Judgment
The only remaining claims by Mr. Raiser against BYU are a claim for invasion of privacy and a claim of violation of the constitutional separation of church and state (brought under 42 U.S.C. § 1983). Mr. Raiser also originally asserted a claim of violation of the Americans with Disabilities Act (ADA), but he conceded at the November 21, 2005 hearing that his ADA claim could not withstand BYU's motion for summary judgment (indeed, his opposition to BYU's motion did not even address BYU's arguments concerning the ADA claim). He accordingly withdrew his ADA claim at the hearing. [*FN9]

[FN6] Mr. Raiser's assertion that the Defendants have thwarted his discovery efforts does not help, as Mr. Raiser could have tested his assumptions in a deposition of Mr. Bramhall, a deposition he now says need not be taken. (See Pl.'s Response to BYU's Mot. Summ. J. at 18.) Information contained in police reports does not implicate a right to privacy.

[FN7] See Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995) ("information contained in police reports [does] not implicate the right to privacy") (internal citation omitted); Scheetz v. The Morning Call, Inc., 946 F.2d 202, 207 (3d Cir.) ("When police are called, a private disturbance loses much of its private character.").

[FN8] Given the dispositive nature of the court's finding, the court declines to address the LDS Church's other defenses.

[FN9] Mr. Raiser originally asserted the following claims against BYU: breach of privacy, defamation, false light, a violation of separation of church and state, and a violation of the Americans with Disabilities Act (the ADA). The list of claims has been winnowed down. Mr. Raiser voluntarily deleted his defamation and false light claims from his complaint after receiving permission from the court to amend his complaint. (See Nov. 2, 2005 Order at 10.)

BYU, in its motion for summary judgment, asserts that Mr. Raiser's claim for breach or privacy is barred by the judicial proceeding privilege and the fact that the communications at issue are true. As for Mr. Raiser's separation of church and state claim, BYU contends that Mr. Raiser's claim fails as a matter of law because he has not suffered any injury attributable to religious bias or government endorsement of religion.

Mr. Raiser's Invasion of Privacy Claim
BYU contends that Mr. Raiser's breach of privacy claim is barred by the judicial proceeding privilege, which is a defense to certain claims under Utah law. The Utah Supreme Court has held that the judicial proceeding privilege, as set forth in Utah Code Ann. § 45-2-3(4), should apply not only to defamation claims (as the statute expressly states) but also to a claim for invasion of privacy based on the same set of

operative facts as a claim for defamation. Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 906 n.37 (Utah 1992). Here, Mr. Raiser originally asserted a claim of defamation against BYU, but he later amended his complaint to remove that cause of action. (See Nov. 2, 2005 Mem. Decision & Order at 10 (granting leave to Mr. Raiser to remove two causes of action, including defamation, from his complaint).) Still, Mr. Raiser's remaining claim for invasion of privacy was based on the same set of facts as the defamation claim. The court finds that the judicial proceeding privilege is a proper defense to Mr. Raiser's claim for invasion of privacy. The judicial proceeding privilege is an absolute defense to such a claim when a statement (1) is made during a "judicial proceeding"; (2) has "some reference" to the subject matter of the Case 2:04-cv-00896- proceeding; and (3) is made by someone acting as legal counsel for a party. DeBry v. Godbe, 992 P.2d 979, 983 (Utah 1999). The Utah Supreme Court adopted a broad interpretation of "judicial proceeding, " noting that the privilege "applies to 'every step in the proceeding until final disposition.'" Id. (internal citation omitted). The statement made in the BYU Memorandum was clearly made during a judicial proceeding (it was part of a memorandum in support of a motion before the court). As for the requirement that the statement have "some reference" to the subject matter of the proceeding, the statement "need not be relevant or pertinent to the judicial proceeding from an evidentiary point of view for the privilege to apply." Id. at 984. And any doubts should be "resolved in favor of the statement having reference to the subject matter proceeding." Id. BYU's statement, in response to allegations of misconduct by the BYU police force, clearly had reference to the subject matter of the proceeding (it was offered to justify the actions of members of the BYU police force in their dealings with Mr. Raiser). And there is no dispute that the statement was made by an attorney representing BYU in the litigation. Mr. Raiser's breach of privacy claim is barred by the judicial

proceeding privilege.

Accordingly, BYU is entitled to summary judgment on Mr. Raiser's invasion of privacy cause of action.

Mr. Raiser's 42 U.S.C. § 1983 Claim Regarding Separation of Church and State

Mr. Raiser asserts that he has been injured by a violation of the Establishment Clause requiring separation of church and state. Under the Establishment Clause, the government "must not foster an excessive government entanglement with religion." Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1261 (10th Cir. 2005) (internal citations and quotation marks omitted). "At its core, the Establishment Clause enshrines the principle that government may not act in ways that 'aid one religion, aid all religions, or prefer one religion over the other.'" Snyder v. Murray City Corp., 159 F.3d 1227, 1230 (10th Cir. 1998) (internal citation omitted). BYU contends that Mr. Raiser has not suffered any injury attributable to religious bias or government endorsement of religion and so his claim fails as a matter of law.

In order to assert a claim under the Establishment Clause of the First Amendment, Mr. Raiser must establish the requisite standing to bring such a claim. A person has standing if he can demonstrate injury traceable to government action which may be redressed by the courts and that his particular interest is within the zone of interests sought to be protected. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982). In an action under the Establishment Clause, Mr. Raiser must have suffered injury because of alleged government action coercing him to practice any particular religion or tending in any way to create a state-endorsed religious faith. Lee v. Weisman, 505 U.S. 577, 588 (1992). Stated another way,

standing under the Establishment Clause exists when a plaintiff's injuries result from religious bias or endorsement, such as being "subjected to unwelcome religious exercises or [being] forced to assume special burdens to avoid them." Valley Forge, 454 U.S. at 487 n.22.

Mr. Raiser's sole injury claim is for damage to his reputation. (See Pl.'s Response to BYU's Mot. Summ. J. at 31.) And in his response to BYU's Motion for Summary Judgment, he acknowledges that the sole basis for his action is an alleged "excessive government entanglement with religion." (Id. at 30.) But Mr. Raiser has not provided any evidence supporting his contention that his injury is attributable to excessive government entanglement with religion. The court finds that he does not have standing to bring an action under the Establishment Clause. Accordingly, BYU is entitled to summary judgment on Mr. Raiser's separation of church and state claim.

The Defendants' Motions for Discovery Sanctions
Because the court grants the LDS Church's and BYU's motions for summary judgment, the Defendants' requests for sanctions in the form of a dismissal of Mr. Raiser's complaint are moot. As for the Defendants' requests for attorneys' fees, the court finds (based on sealed sworn affidavits submitted to the court by Mr. Raiser) that Mr. Raiser, who is proceeding pro se, does not have the financial ability to pay such fees. Awarding attorneys' fees to the Defendants would be a fruitless endeavor. For the foregoing reasons, the Defendants' motions for sanctions are denied.

The court, however, recognizes the unnecessary burden Mr. Raiser's litigation behavior has placed on the Defendants. As noted below, the court recommends (as did Magistrate Judge Wells in her November 2, 2005 Order on pages 17-19) that Mr. Raiser be placed on the court's restricted filer list to prevent future abusive behavior on his part.

Plaintiff's Motion for Rule 60 Relief from Order Dated 4/26/05 and Related Motion for Sanctions

Mr. Raiser has filed a Motion for Rule 60 Relief from the court's Order dated April 26, 2005 (Dkt # 122). He also filed a related Motion for Sanctions requesting assessment of penalties against the Defendants for "purposefully alter[ing] that Order to gain certain advantage in the case. . . ." (Dkt # 121).

Mr. Raiser, by filing his Rule 60 motion, essentially has filed an "after the fact" objection to the form of the Order signed by the court on April 26, 2005. Mr. Raiser's motion reads in full as follows:

Plaintiff motions for relief from the Order dated on or about 4/25/05 regarding the discovery Order [and bases his argument] on Plaintiff's previously submitted motion for sanctions dated on or about 7/25/05. Defendant(s) did engage in deceit and fraud when submitting that proposed order to gain advantage in the case as they materially altered it on purpose to gain that advantage. Plaintiff asks for a hearing regarding this matter. The Relief sought is for Plaintiff to not have to be deposed at this time by defendant as the 4/19/05 hearing forbid it and for other relief the court sees as appropriate. (Plaintiff's Am. Mot. for Rule 60 Relief from Order (Dkt # 122).)

The court declines to grant relief from its April 26, 2005 Order. First, Mr. Raiser's 60(b) motion was filed more than one year after the Order was issued, in violation of the requirement of Federal Rule of Civil Procedure 60(b). Second, even if Mr. Raiser had filed his motion in a timely manner, the transcript of the hearing giving rise to the April 26, 2005 Order shows that the Order as drafted is correct. (See Transcript of Apr. 19, 2005 Hearing (Dkt # 42).)

There was no mistake or fraud in the drafting of the order. The written order accurately reflects the court's ruling at the hearing. Accordingly, the court denies Mr. Raiser's Rule 60 Motion and Mr. Raiser's Motion for Sanctions. Plaintiff's Motion to Amend the Complaint Mr. Raiser's motion for leave to amend his complaint (Dkt # 13) was held in abeyance during the court's April 19, 2005 hearing on various motions, "pending the completion of discovery and resolution of any renewed Motion for Summary Judgment." (Apr. 26, 2005 Order (Dkt # 35).) In that motion to amend, Mr. Raiser moved to assert a new claim for "breach of confidence." His motion states that the same facts previously alleged support his new claim. Federal Rule of Civil Procedure 15(a) makes clear that leave to file an amended Case 2:04-cv-00896-TC Document 215 Filed 02/07/2006 complaint shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). Still, because the permissive period within which to amend the complaint has passed, the decision to grant leave is within the court's discretion. Id.; Pallottino v. City of Rio Rancho, 31 F.3d 1023, 1027 (10th Cir. 1994); Bauchman v. West High Sch., 132 F.3d 542, 559 (10th Cir. 1997).

The Defendants contend that the court should not allow Mr. Raiser to add his proposed claim for "breach of confidence" because such an amendment would be futile. Futility of a proposed amendment – such as its inability to survive a motion to dismiss – is one recognized ground for denial of a motion to amend. Bauchman, 132 F.3d at 559. "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." Gohier v. Enright, 186 F.3d 1216, 1218 (10th Cir. 1999).
Mr. Raiser contends that the "breach of confidence" claim has four elements: "(1) a confidential communication (2) made to a person who had a duty to keep that communication confidential and (3) that duty was breached and (4) the Plaintiff was injured thereby." (Pl.'s Mot. For Am. Compl.

(Dkt #13) at 1.) He cites no case law to support his proposition. Even assuming such a cause of action exists in Utah (a questionable assumption, as noted in the LDS Church's opposition to Mr. Raiser's motion to amend), the court finds that Mr. Raiser has not pled allegations that would support the purported cause of action. Accordingly, his amendment would be futile and the court denies his motion to add the claim of "breach of confidence."

The Defendants' Vexatious Litigant Motions The Defendants have moved this court to permanently enjoin Mr. Raiser from filing any lawsuit in this jurisdiction without first obtaining leave of the court. Because the Defendants seek relief that goes beyond the scope of the case currently assigned to this court, the court finds that it does not have authority to grant the Defendants' motions. Still, the District Court of Utah, through its Chief Judge (Judge Dee Benson), has the authority to enjoin litigants who abuse the court system. See 28 U.S.C. § 1651(a). Magistrate Judge Brooke Wells has already recommended that Mr. Raiser be placed on the District Court of Utah's restricted filer list. (See Nov. 2, 2005 Order at 19.) This court hereby makes the same recommendation to Chief Judge Dee Benson. The court denies the Defendants' vexatious litigant motions without prejudice. But the court also forwards the papers associated with the Defendants' vexatious litigant motions to Judge Benson for consideration of the question whether Mr. Raiser should be placed on the restricted filer list for the District of Utah.

BYU's Motion to Strike
Based on the court's denial of BYU's Motion for Permanent Injunction Against Aaron Raiser as a Vexatious Litigant, BYU's Motion to Strike Plaintiff's Response to Motion to Hold Plaintiff as a Vexatious Litigant is moot.

ORDER

For the foregoing reasons, the court ORDERS as follows:
1. Defendant LDS Church's Renewed Motion for Summary Judgment (Dkt # 115) is GRANTED.
2. Defendant BYU's Motion for Summary Judgment (Dkt # 189) is GRANTED.
3. Defendant LDS Church's Motion for Discovery Sanctions (Dkt # 52) is DENIED.
4. Defendant BYU's Motion for Discovery Sanctions (Dkt # 59) is DENIED.
5. Plaintiff Aaron Raiser's Rule 60 Motion (Dkt # 122) for Relief from Order dated 4/26/05 is DENIED.
6. Plaintiff Aaron Raiser's Motion for Sanctions (Dkt # 121) is DENIED.
7. Plaintiff Aaron Raiser's motion for leave to amend the Complaint (Dkt # 13) is DENIED.
8. Defendant BYU's Motion for Permanent Injunction Against Aaron Raiser as a Vexatious Litigant (Dkt # 134) (in which the LDS Church joins (see Dkt # 144)) is DENIED WITHOUT PREJUDICE and REFERRED TO CHIEF JUDGE DEE BENSON FOR RESOLUTION with a recommendation that Mr. Raiser be placed on the court's restricted filer list.
9. Defendant BYU's Motion to Strike Plaintiff's Response to Motion to Hold Plaintiff as a Vexatious Litigant (Dkt # 184) is DENIED AS MOOT.

DATED this 7 day of February, 2006.
BY THE COURT:
TENA CAMPBELL
United States District Judge

BY THE COURT:

TENA CAMPBELL
CENTRAL DIVISION
United States District Judge

Appendix C – Order On Motion To Reconsider/Petition For Panel Rehearing

United States Court of Appeals,
Tenth Circuit.

Aaron RAISER, also known as T.G.,
Plaintiff-Appellant,
v.
CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; Brigham Young University,
Defendants-Appellees.

06-4066
Order Denying Rehearing

Filed February 20, 2007

Before Kelly, Lucero, Hartz, Circuit Judges.

The matter is before the Court on Appellant's Motion to Reconsider, which is construed as a Petition for Rehearing. As construed, Appellant's Petition for Rehearing is denied.

Entered For the Court
Elizabeth A. Shumaker, Clerk

By: s/_____

Deputy Court Clerk

Appendix D – District Court Hearing of 4/19/05 – Doc. 42

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION
CIVIL NO. *2:04-CV-896*

T.G., PLAINTIFF,
VS.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND BRIGHAM YOUNG UNIVERSITY, DEFENDANTS.

APRIL 19, 2005

SALT LAKE CITY, UTAH

ALL PENDING MOTIONS
BEFORE THE HONORABEL TENA CAMPBELL
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFF:
T.G

FOR DEFENDANT CHURCH:

KIRTON & MC CONKIE
BY: R. WILLIS ORTON, ESQ. STEPHEN W. GEARY, ESQ. 60 EAST SOUTH TEMPLE, #1800
P.O. BOX 45120 SALT LAKE CITY, UTAH 84145-0120
FOR DEFENDANT B.Y.U.:
BENNETT TUELLER JOHNSON & DEERE
BY: DANIEL L. STEELE, ESQ. 3865 SOUTH WASATCH

BLVD., SUITE 300 SALT LAKE CITY, UTAH 84109
(801) 272-5600
COURT REPORTER:
RAYMOND P. FENLON 350 SOUTH MAIN STREET, #242
SALT LAKE CITY, UTAH 84101 (801) 809-4634
PROCEEDINGS

APRIL 19, 2005
3:00 P.M.

THE COURT: PLAINTIFF, YOU CAN HEAR ME, AM I CORRECT?

THE PLAINTIFF: YEAH, I CAN HEAR YOU OKAY.

THE COURT:: ALL RIGHT. WE'RE HERE IN T.G., WHICH IS NOT A CORRECT NAME BUT IS A NAME THAT HAS BEEN PLACED ON THE PLEADINGS, VERSUS THE CHURCH OF JESUS CHRIST AND B.Y.U., HERE ON ASSORTED MOTIONS. REPRESENTING THE DEFENSE IS MR. STEELE FOR B.Y.U., MR. GEARY AND MR. ORTON FOR THE CHURCH. WE HAVE BY MY RECKONING THREE PENDING MOTIONS. WE HAVE THE CHURCHE'S MOTION FOR SUMMARY JUDGMENT. WE HAVE THE PLAINTIFF'S MOTION FOR SANCTIONS. WE HAVE THE PLAINTIFF'S MOTION TO AMEND. IS THAT WHAT YOU BELIEVE WE HAVE ON THE AGENDA, DEFENSE?

THE PLAINTIFF: YEAH, THAT'S PERFECT.

THE COURT:: AND DEFENSE?

MR. ORTON: YOUR HONOR, THERE IS ONE OTHER PENDING MOTION. THAT WAS THE MOTION FOR PSEUDONYM THAT WAS FILED INITIALLY.

THE COURT:: OH, YES, THE MOTION FOR PSEUDONYM. WELL, I'M GOING TO GRANT THAT NOW

SIMPLY BECAUSE -- WAIT. LET ME HEAR YOU ON THAT.

MR. ORTON: I JUST FILED AN OPPOSITION TO THAT.

THE COURT:: THEN I SHANT RULE ON THAT. I SHANT RULE ON IT. I CAN DO THAT SIMPLY FROM THE PLEADINGS. SO WE'LL JUST TAKE UP THOSE THREE. I AM GOING TO FOCUS --

THE PLAINTIFF: I CANNOT HEAR THE OPPOSING COUNSEL.

THE COURT:: OKAY. WHAT I'M GOING TO DO THEN, PLAINTIFF, IS WHEN IT'S TIME -- WHAT HE SAID THOUGH WAS HE DOES NOT WISH TO HAVE THE MOTION FOR USE OF A PSEUDONYM RULED UPON NOW BECAUSE HE JUST FILED HIS OPPOSITION. I AGREE THAT HE HAS TIME TO BE -- SHOULD BE HEARD, AND I CAN SIMPLY DEAL WITH THAT BY WRITTEN ORDER. ALL WE'RE GOING TO DEAL WITH TODAY, PLAINTIFF AND DEFENSE, ARE THE THREE MOTIONS I JUST STATED. I'M GOING TO CONCENTRATE TODAY ON THE MOTION FOR SUMMARY JUDGMENT AND THE MOTION TO AMEND, WHICH BY THE WAY HAS BEEN JOINED IN BY B.Y.U. I CAN QUICKLY DISPOSE OF THE MOTION FOR SANCTIONS. I AM GOING TO DENY THE MOTION FOR SANCTIONS. I DO SO FOR THIS REASON. THERE WAS AND IS NO ORDER WHICH SAYS THAT PLAINTIFF SHALL BE REFERRED TO AS T.G. I GATHER THAT THE DEFENSE IS SIMPLY NOW DOING SO IN AN AHUNDANCE OF CAUTION. THEREFORE, THERE IS NO AUTHORITY, NOR IS THERE ANY GOOD REASON, THAT WOULD PERMIT SANCTIONS. DEFENDANTS DID NOT DISOBEY ANY COURT ORDER BECAUSE THERE IS NO COURT ORDER. PLUS, THIS IS EARLY IN THE LITIGATION, AND WE ARE NOT IN A POSITION WHERE THERE ARE DISCOVERY SANCTIONS. THEREFORE, THAT MOTION IS DENIED. I AM, AS SORT OF AN

OFFSET OF THE DEFENSE MOTION, GOING TO GRANT THEIR REQUEST AS FOLLOWS. SHOULD THERE BE FURTHER MOTIONS FILED FOR SANCTIONS BY EITHER SIDE, THE PARTY OPPOSING THE MOTION FOR SANCTIONS DOES NOT HAVE TO RESPOND UNTIL AND UNLESS I DIRECT THEM TO. IN THAT WAY I CAN SCREEN ANY MOTIONS FOR SANCTIONS. THAT DOESN'T MEAN THEY WON'T BE FILED. BUT IF I CAN DECIDE THEM WITHOUT NECESSITY OF HEARING FROM THE OTHER SIDE, I WILL DO SO. WHAT THAT MEANS, OF COURSE, IS THE PERSON AGAINST WHOM SANCTIONS MIGHT BE IMPOSED WOULD ALWAYS HAVE A CHANCE TO RESPOND. HOWEVER, IF THERE'S CLEARLY NO GROUND FOR SANCTION THAT PARTY OR PERSON WOULD NOT HAVE TO UNDERGO THE EXPENSE AND TIME OF RESPONDING. NOW, LET'S TALK ABOUT THE MOTION FOR SUMMARY JUDGMENT. AS IT STANDS NOW PLAINTIFF'S COMPLAINT ASSERTS ONLY ONE CLAIM AGAINST THE CHURCH. THAT IS THE CLAIM FOR BREACH OF PRIVACY. AS THE RECORD NOW STANDS, THE EVIDENCE, AT LEAST AS IT NOW STANDS, THE EVIDENCE IS CLEAR THAT THE PERSONS INVOLVED WITH THE CHURCH DID NOT REVEAL THIS COMMUNICATION THAT PLAINTIFF ALLEGES VIOLATED HIS RIGHT TO PRIVACY. I FIND MOST COMPELLING THE AFFIDAVIT OF MR. DAVIS, WHO SAYS, "I DID NOT GET THAT INFORMATION FROM THE CHURCH. I GOT IT FROM POLICE RECORDS." AND SINCE THE PUBLICATION OF IT OCCURRED IN THE MEMORANDUM FILED BY B.Y.U., WHERE THE PERSON WHO WROTE THE MEMORANDUM AND WROTE THE PHRASE, HE SAYS, "THAT'S WHERE I GOT IT," THAT SEEMS TO ME TO BE ABSOLUTELY DISPOSITIVE. HOWEVER, I AM --

THE PLAINTIFF: CAN I COMMENT ON THAT?

THE COURT:: YEAH, IF YOU'LL LET ME FINISH, PLEASE.

THE PLAINTIFF: OKAY.

THE COURT:: HOWEVER, I AM AWARE THAT THE PLAINTIFF HAS PREPARED -- OR HAS PLED TO SOME DEGREE WHAT I AM TAKING TO BE A 56(F) MOTION. THAT MEANS HE IS SAYING THAT IT IS EARLY IN THE LITIGATION, AND HE BELIEVES HE IS ENTITLED TO SOME SORT OF DISCOVERY ON THE ISSUE. THE PROBLEM IS I DON'T KNOW WHAT THAT DISCOVERY WOULD BE. I'M GOING TO ASK YOU NOW, PLAINTIFF, TO ADDRESS PRIMARILY THAT ISSUE AND ANY OTHER ISSUES THAT YOU WISH TO RAISE. BUT IF YOU WANT DISCOVERY, YOU'RE GOING TO HAVE TO TELL ME SPECIFICALLY WHAT KIND OF DISCOVERY AND FROM WHOM YOU BELIEVE WOULD BE NECESSARY. SO YOU GO AHEAD, PLAINTIFF.

THE PLAINTIFF: OKAY. I DON'T REALLY CHALLENGE THAT IF -- THE CHURCH SHOULDN'T BE IN THIS CASE IF HE INDEED DID GET IT FROM A SOURCE OTHER THAN ANYBODY ASSOCIATED WITH THE CHURCH. HOWEVER, JUST AS A GENERAL OVERVIEW, ACCORDING TO THE COMPLAINT THERE ESSENTIALLY IS ONLY TWO PEOPLE IN UTAH -- THIS IS WHERE I'M COMING FROM -- THAT ARE AWARE THAT I DO INDEED HAVE A PSYCHIATRIC HISTORY OR SOMETHING TO THAT EFFECT. AND THOSE ARE DAN TOWSEY AND EUGENE BRANHALL. EUGENE BRAMHALL WORKING AS GENERAL COUNSEL, IT JUST SEEMS -- I MEAN IF YOU CAN UNDERSTAND WHERE I COME FROM, WHEN ALL OF A SUDDEN A THIRD PERSON HAS THAT INFORMATION, AND THEY HAPPEN TO BE IN GENERAL COUNSEL'S OFFICE, IT RAISES SOME CONCERNS THAT PERHAPS THAT THAT INFORMATION WAS LEAKED AROUND. SO THAT'S INITIALLY WHY THIS COMPLAINT IS HERE. HOWEVER, READING THE AFFIDAVIT OF MR. DAVIS, I DON'T BELIEVE IT'S CONCLUSIVE FOR TWO REASONS. FIRST OF ALL, IF EUGENE BRAMHALL -- AND THIS IS INCONCLUSIVE AT THIS POINT AND WHY WE NEED DISCOVERY -- IF HE AS GENERAL COUNSEL,

UPON FINDING THAT I HAD ESCAPED FROM A MENTAL INSTITUTION FROM ANOTHER STATE, OR TO THAT EFFECT, IF HE CONTACTED THE POLICE AND THEN -- AND REPORTED 'THIS TO THEM AND THAT IN TURN GOT IN THEIR FILES, WHICH IN TURN MR. DAVIS USED, THEN I BELIEVE THERE WOULD BE A POSSIBLE BREACH OF CONFIDENCE OR PRIVACY OR POSSIBLY NEGLIGENCE ON BEHALF OF THE CHURCH BECAUSE SOMEHOW THAT INFORMATION HAS BEEN LEAKED OUT. NOW, TO VERIFY THAT ONE WAY OR THE OTHER WOULD BE FAIRLY SIMPLE IN MY OPINION. I BELIEVE -- AND IN FACT LAST WEEK I SENT IN. -- SENT THE DEFENDANT A DISCOVERY REQUEST FOR THAT INFORMATION, SPECIFICALLY REQUEST FOR PRODUCTION OF DOCUMENTS RELATED TO WHAT EXACTLY MR. DAVIS DID IN FACT READ THAT CONTAINED THAT INFORMATION. NOW, IF IT TURNS OUT THAT THEY GOT IT FROM THE PROVO POLICE DEPARTMENT OR THE F.B.I. OR SOMETHING LIKE THAT, THEN THAT WOULD BE -- THAT WOULD GO IN THE CHURCH'S FAVOR. HOWEVER, THERE WOULD STILL BE ONE OTHER POSSIBILITY, THAT MR. BRAMHALL -- BROTHER BRAMHALL DID IN FACT TELL ANOTHER PERSON IN THE GENERAL COUNSEL'S OFFICE AND THEY IN TURN TOLD MR. DAVIS. NOW, I UNDERSTAND THAT HIS AFFIDAVIT IS KIND OF CONVINCING. HOWEVER, I DON'T SEE THAT AS BEING CONCLUSIVE THAT HE WAS TOLD BY NO OTHER PERSON. LET ME GIVE YOU AN EXAMPLE OF WHAT COULD HAVE HAPPENED. LET'S SAY ANOTHER MEMBER OF GENERAL COUNSEL' S OFFICE FOUND OUT ABOUT THE LITIGATION BETWEEN MYSELF AND B.Y.U. AND THEY APPROACHED MR. DAVIS WHO WAS NEW AND SAID, "HEY, WE GOT THIS INFORMATION THAT MR. RAISER ESCAPED FROM A -- HE'S GOT A MENTAL -- HE'S BEEN IN A MENTAL HOSPITAL," OR WHATEVER. AND THEN THAT PERSON SAYS, "HEY, BUT THAT INFORMATION IS IN THE POLICE FILES. GO DOWN AND READ ABOUT IT." SEE, IF SOMETHING LIKE THAT OCCURRED, THEN MR. DAVIS' AFFIDAVIT WOULD STILL BE TRUE AND ACCURATE. HE GOT

THAT INFORMATION FROM THE POLICE FILES. HOWEVER, HE ALSO GOT IT FROM -- POSSIBLY GOT IT

FROM ANOTHER PERSON FROM THE GENERAL COUNSEL'S OFFICE. AND THAT'S WHY SIMPLE CROSS-EXAMINATION IS IMPORTANT. I UNDERSTAND THIS IS -- I HATE PLAYING ON WORDS AND STUFF LIKE THAT, BUT HE SAYS ON PAGE TWO OF HIS AFFIDAVIT ON TEM NUMBER FIVE IT'S NOT BASED ON INFORMATION SUPPLIED BY EUGENE HRAMHALL -- WHICH IS PROBABLY TRUE IF THEY WEREN'T WORKING AT THAT TIME. HE HAD RETIRED -- OR ANY OTHER PERSON IN THE OFFICE OF GENERAL COUNSEL. HOWEVER, IT'S POSSIBLE THAT -- I HATE DOING WORD PLAYS, BUT IT'S POSSIBLE THAT IN THE HALLWAY HE WAS TOLD THAT I HAD A MENTAL ILLNESS OR WHATEVER FROM ANOTHER PERSON OF GENERAL COUNSEL, AND THAT THEREFORE WAS NOT TOLD TO HIM IN THE OFFICE OF GENERAL COUNSEL. IT WAS TOLD TO HIM IN THE HALLWAY. IT'S JUST LITTLE THINGS LIKE THAT. AND I HATE BEING TRICKY, BUT YOU HAVE TO HAVE EFFECTIVE CROSS-EXAMINATION, AND THAT'S WHY A SIMPLE INTERROGATORY THAT COULD PIN DOWN THAT IT DID NOT EMANATE OR HE WAS NOT TOLD BY ANYBODY ELSE. AND THAT REQUIRES A HIGH DEGREE OF SPECIFICITY, ETCETERA. NOW, IF THAT IN TURN COMES OUT THAT NOBODY ELSE HAD THAT INFORMATION FROM THE GENERAL COUNSEL'S OFFICE, ETCETERA, THEN I COMPLETELY 10 PERCENT AGREE THAT THE CHURCH -- UNLESS SOMETHING ELSE COMES UP, WHICH I DON'T ANTICIPATE -- THE CHURCH NEEDS TO BE OUT OF THIS CASE.

THE COURT:; OKAY. COUNSEL --

THE PLAINTIFF: HOWEVER, I BELIEVE THAT DISCOVERY IS SIMPLE ENOUGH AT POINT JUST TO GET THE POLICE RECORDS AND JUST TO SEE WHAT HE READ, AND THAT MAY INDICATE WHERE THAT

SOURCE OF INFORMATION COMES. AND I SERIOUSLY BELIEVE THAT THE POLICE WOULD HAVE KEPT TRACK — IF THEY SAY I HAVE A PSYCHIATRIC HISTORY IN THEIR FILES, THEY WOULD HAVE INFORMATION WHERE HE GOT THAT FROM. NOW, THE THIRD THING THAT IS IMPORTANT ALSO, BEFORE I FORGET, IS WHEN I APPLIED TO B.Y.U. IN THE SPRING OF '92, I HAD AN INTERVIEW WITH EUGENE BRAMHALL, AND HE REQUIRED ME TO GO TO THE -- TO SEE THE SCHOOL PSYCHOLOGIST AS A PREREQUISITE BEFORE I WAS ACCEPTED. AND I WOULD IMAGINE THAT THERE IS SOMETHING ON FILE, AND I HAVE REQUESTED ALSO THIS LAST WEEK -- AS OF LAST WEEK I REQUESTED THIS FROM THE DEFENDANT TO GET THE SCHOOL RECORDS RELATED TO MY ADMISSION OF THE SPRING OF 1992. AND THAT MIGHT BE HELPFUL AS FAR AS REFRESHING BROTHER BRAMHALL'S MEMORY, EUGENE HRAMHALL'S MEMORY, AS TO WHETHER HE HAD THAT INFORMATION. I BELIEVE IF I -- WE CAN GET THOSE RECORDS, THERE WOULD BE SOME BASIS. I MEAN THE SCHOOL PSYCHOLOGIST PROBABLY GOT A REPORT, "HEY, TALK TO THIS GUY," BUT THERE'S PROBABLY SOME REASON, AND THERE'S PROBABLY A SOURCE OF THE BASIS OF WHY I WAS REQUIRED TO SEE THE SCHOOL PSYCHOLOGIST. AND I JUST DON'T SEE IT AS BEING A COINCIDENCE. SO IF INDEED EUGENE BRAMHALL DID REVEAL TO THE ADMISSIONS COMMITTEE THAT I HAD A PSYCHIATRIC HISTORY AND THEREFORE I'M REQUIRED TO TALK TO THE SCHOOL PSYCHOLOGIST, SEE THEN THAT WILL AT LEAST ESTABLISH THAT EUGENE BRAFIHALL HAD POSSESSION OF THAT INFORMATION. NOW, WHETHER ERIC DAVIS GOT THAT INFORMATION FROM ANOTHER SOURCE REMAINS TO BE SEEN. BUT I BELIEVE THOSE THREE THINGS ARE VERY SIMPLE AT THIS POINT TO ACQUIRE DISCOVERY AND WOULD LIKELY INDICATE ONE WAY OR THE OTHER WHETHER THE DEFENDANT CHURCH OUGHT TO BE IN THIS CASE. AND IF THEY DON'T, I HAVE NO OBJECTION TO THEM BEING OUT.

IT'S JUST PERHAPS A COINCIDENCE. BUT I BELIEVE IT JUST DESERVES A LITTLE BIT OF DISCOVERY AND IT'S SIMPLE ENOUGH AT THIS POINT.

THE COURT:: OKAY. LET ME STOP YOU.

THE PLAINTIFF: SO THAT'S --

THE COURT:: WAIT. LET ME JUST STOP YOU, PLEASE. AND WE HAVE MR. GEARY. I WANT YOU TO MAKE SURE YOU SPEAK VERY LOUDLY SO THAT I CAN HEAR YOUR RESPONSE, PLEASE.

MR. GEARY: YES, YOUR HONOR. I WILL TRY --

THE COURT:: CAN YOU HEAR HIM, PLAINTIFF?

THE PLAINTIFF: JUST BARELY.

THE COURT:: WHY DON'T YOU COME UP, IF YOU WOULD, AND YOU CAN JUST STAND RIGHT HERE AND SPEAK SO THAT YOU CAN BE HEARD BY THE PHONE. OKAY.

MR. GEARY: THANK YOU, YOUR HONOR. I'LL TRY TO LIMIT MY REMARKS TO JUST THREE BASIC POINTS THAT I THINK THE COURT SHOULD KEEP IN MIND. FIRST AND FOREMOST, ALL OF THESE AREAS OF DISCOVERY THAT THE PLAINTIFF IS PROPOSING ARE SHEAR SPECULATION. THERE'S NO FOUNDATION GIVEN FOR BELIEVING THAT THESE PEOPLE EVER HAD THE KNOWLEDGE. SECOND, THAT'S PARTICULARLY SIGNIFICANT WHEN YOU CONSIDER THAT IF THEY EVER HAD THIS KNOWLEDGE, THEY HAD TO GET IT FROM SOME SOURCE. MOST LIKELY DIRECTLY FROM PLAINTIFF. IF THERE WAS THAT FOUNDATION, PLAINTIFF COULD RAVE AND SHOULD HAVE SUBMITTED AN AFFIDAVIT SAYING, ITI TOLD DAN TOWSEY THIS ABOUT MY PSYCHOLOGICAL HISTORY." OR, "I TOLD GENE BRAMHALL THIS."

THAT'S NEVER BEEN PUT BEFORE THE COURT, DESPITE OUR HIGHLIGHTING THAT ISSUE IN OUR OWN PAPERS. THIRD AND FINALLY, THIS IS NOW FOUR MONTHS AFTER WE FILED OUR MOTION, FOUR MONTHS IN WHICH PLAINTIFF HAS HAD TO CONDUCT EXACTLY THAT DISCOVERY. BOTH MR. TOWSEY MR. BRAMHALL ARE EASILY LOCATED DOWN IN PROVO, AS IS MR. DAVIS. PLAINTIFF HAS MADE NO ATTEMPT TO DEPOSE ANY OF THESE INDIVIDUALS. JUST VERY RECENTLY -- WE JUST RECEIVED IT IN THE MAIL TODAY PLAINTIFF'S DISCOVERY REQUESTS. EVEN THOSE WILL NOT NECESSARILY DO ANYTHING TO TIE THE CHURCH INTO THIS CASE. I THINK WE'VE MADE OUT OUR CASE ON SUMMARY JUDGMENT TO BE OUT OF THIS CASE, AND THE COURT SHOULD AFFIRM.

THE COURT: LET ME ASK YOU, DEFENSE IN AN EXCESS OF CAUTION. I SEE THAT THE DISCOVERY CUTOFF IS JUNE 5TH. I WOULD BE WILLING TO EXTEND IT ONE MONTH IF I ALLOWED PLAINTIFF TO DEPOSE THE THREE PEOPLE YOU'RE TALKING ABOUT, MR. DAVIS, MR. BRAMHALL -- MR. TOWNSEND?

MR. STEELE; TOWSEY.

THE COURT: TOWSEY AND IF YOU COULD FULFILL THE DISCOVERY REQUESTS. AND THEN LET'S SAY — WHAT'S TODAY? THE 19TH. IF THAT DISCOVERY WERE TO BE COMPLETED BY JULY 19TH, 2005, AND THEN IF I GAVE YOU, IF YOU CHOSE, ONE MONTH TO RENEW YOUR MOTION. AND THEN, PLAINTIFF, YOU COULD RESPOND, POINTING TO THE NEW DISCOVERY IF YOU THOUGHT THAT IT BOLSTERED YOUR CASE. AND YOU MIGHT CONSIDER AN AFFIDAVIT, SUCH AS WAS SUGGESTED. I BELIEVE THAT THAT WOULD BE THE MORE CAUTIOUS WAY TO PROCEED. COUNSEL FOR THE DEFENSE, WHAT DO YOU -- DO YOU AGREE TO THAT?

MR. GEARY: WE WOULD ACTUALLY OPPOSE THAT, YOUR, HONOR, FOR THE REASON THAT EVEN IF PLAINTIFF'S DISCOVERY WERE SUCCESSFUL AND HE TURNED UP THE SMOKING GUN LETTER, AS IT WERE, OUR MOTION IS SUPPORTED BY MULTIPLE INDEPENDENT GROUNDS, INCLUDING, FOR EXAMPLE, THE ONLY PUBLICATION ALLEGED BY ANYONE ASSOCIATED WITH THE CHURCH IS A PURELY PRIVATE DISCLOSURE. IT'S THAT GENE BRAMHALL OR DAN TOWSEY TOLD SOMEONE IN THE GENERAL COUNSEL'S OFFICE; OR PERHAPS TOLD SOMEONE IN THE POLICE DEPARTMENT. UNDER UTAH LAW, WHICH DEFINE THE PARAMETERS OF THIS CAUSE OF ACTION, THE DISCLOSURE MUST BE TO THE PUHLIC AT LARGE OR TO A SUFFICIENTLY LARGE NUMBER OF PEOPLE AS TO ACCOUNT FOR THAT. FURTHERMORE, THE ONLY PUBLIC DISCLOSURE THAT WE HAVE HERE BY MR. DAVIS OR B.Y.U. WAS ABSOLUTELY PRIVILEGED.

THE COURT:: I DO NOT BELIEVE THAT FILING A MEMORANDUM QUITE FALLS WITHIN THE JUDICIAL PRIVILEGE AS IT WAS BRIEFED. I THINK WHAT PEOPLE SAY AND DO IN A COURT —— BUT THE LAW THAT YOU CITED TO ME -- AND I ALSO WILL TELL YOU THAT THE LAW AS FAR AS THE PARAMETERS OF THE RIGHT TO PRIVACY WAS NOT REALLY EXPANDED. YOU JUST GAVE ME ONE CASE, AND THAT CASE FRANKLY DIDN'T EVEN HAVE THE CITATION. HERE IS WHAT I'M GOING TO DO. I AM GOING TO DENY WITHOUT PREJUDICE THE CHURCH'S MOTION FOR SUMMARY JUDGMENT. I AM GOING TO GRANT THE 56(F) MOTION OF PLAINTIFF ON THESE CONDITIONS. AND I WILL NOT EXTEND THE DISCOVERY. I KNOW, PLAINTIFF, YOUTRE PRO SE BUT THE DEFENSE IS CORRECT. THIS HAS ALREADY DRAGGED ON FOUR MONTHS BEYOND THEIR FILING OF THE MOTION, AND THERE HAS BEEN NO DISCOVERY. ALL YOUR DISCOVERY MUST BE COMPLETED NO LATER THAN JULY 19TH, 2005. THIS DISCOVERY WILL CONSIST ONLY OF THE

DEPOSITIONS OF MR. DAVIS, THE DEPOSITION OF MR. BRAMHALL AND THE DEPOSITION OF DAN TOWSEY.

MR. ORTON: CLARIFICATION, YOUR HONOR. IS THAT ORAL DEPOSITION?

THE PLAINTIFF: COULD I EXPAND THAT BY ONE MORE?

THE COURT:: JUST A MINUTE. AS OPPOSED TO WHAT? WHAT KIND OF DEPOSITION?

MR. ORTON: DEPOSITION BY INTERROGATORY.

THE COURT:: HOW WOULD --

THE PLAINTIFF: WELL, IT'S --

THE COURT:: MISTER --

THE PLAINTIFF: IT MIGHT BE HELPFUL --

THE COURT:: PLAINTIFF.

THE PLAINTIFF: -- FINDING OUT HOW THAT INFORMATION GOT INTO THE POLICE FILES.

THE COURT:: PLAINTIFF ——

THE PLAINTIFF: I MIGHT WANT TO DEPOSE MY PARENTS.

THE COURT:: PLAINTIFF, PLEASE BE QUIET. THAT IS THE ONLY DISCOVERY THAT NEEDS BE TAKEN. YOUR PARENTS OR ANYONE AFFILIATED WITH YOU CERTAINLY IS FREE -- YOU ARE FREE TO SUBMIT THEIR AFFIDAVITS, INCLUDING THE AFFIDAVITS OF YOUR PARENTS, INCLUDING YOUR OWN AFFIDAVITS. BUT AS FAR AS TAKING DEPOSITIONS, ETCETERA, OF

THE WITNESSES THAT ARE NOT AFFILIATED WITH YOU, THAT IS THE LIMIT. NOW, ARE YOU SAYING THAT YOU WOULD DO THIS BY WRITTEN INTERROGATORY –

MR. ORTON: NO.

THE COURT:: -- OR BY ORAL DEPOSITION?

MR. ORTON: ORAL DEPOSITION.

THE COURT:: I BELIEVE, PLAINTIFF, WE NEED TO DO IT BY ORAL DEPOSITION, WHICH WOULD REQUIRE THAT YOU TRAVEL HERE, BECAUSE IT IS YOUR STATED BELIEF THAT WHAT YOU CALL CROSS-EXAMINATION IS NECESSARY TO GET TO THE TRUTH OF THE MATTER. THE ONLY WAY ANYTHING THAT WOULD APPROXIMATE CROSS-EXAMINATION CAN BE DONE IS THROUGH A FACE-TO-FACE SORT OF CONFRONTATION. I THINK THAT YOU WOULD FIND THAT I WOULD BE FACED THEN PREFER, MR. ORTON, TO WITH A SITUATION OF YOUR STATING THAT THEIR ANSWERS WERE INCOMPLETE IF WE DID IT THROUGH WRITTEN MEANS. DO YOU UNDERSTAND WHAT THAT MEANS? THAT YOU ARE GOING TO HAVE TO ARRANGE WITH DEFENSE COUNSEL AS SOON AS POSSIBLE TO MAKE PEOPLE AVAILABLE FOR THEIR ORAL DEPOSITIONS. DO YOU UNDERSTAND THAT, PLAINTIFF?

THE PLAINTIFF: YEAH. I'VE GOT THIS -- COULD I SAY SOMETHING REAL QUICK? I'M ON A PAY PHONE, AND I'M SUPPOSED TO HAVE AN HOUR AND FOR SOME REASON THIS PHONE MIGHT CUT OUT IN LIKE A COUPLE MINUTES. I MIGHT HAVE TO CALL YOU BACK IF WE CAN'T FINISH IT.

THE COURT:: I THINK WE'RE PRETTY FINISHED.

THE PLAINTIFF: PART OF THE PROBLEM IS RIGHT NOW I'M UNDER SEVERE FINANCIAL CONSTRAINTS. TO BE HONEST, I AM HOMELESS, YOUR HONOR, AND I AM UNDER SEVERE CONSTRAINTS JUST TO FIND ENOUGH MONEY TO GET ENOUGH FOOD FROM DAY TO DAY. SO IT'S GOING TO BE DIFFICULT FOR ME TO TRAVEL. I WOULD PREFER TO BE ABLE TO DO THIS JUST BY WRITTEN INTERROGATORIES, ETCETERA, OR PERHAPS BY PHONE. BUT I'D RATHER DO THIS BY WRITING. BUT IN ADDITION TO THE DEPOSITIONS, I WOULD ASK THAT THE DISCOVERY REQUESTS I'VE ALREADY MADE OF DEFENSE AS FAR AS THE PSYCHOLOGICAL COUNSEL'S RECORDS THAT I'VE REQUESTED AND THE POLICE RECORDS THAT MR. DAVIS READ, I WOULD ASK THAT THEY WOULD ALSO ANSWER THOSE TO -- THOSE -- THE INTERROGATORIES AND REQUESTS I'VE CURRENTLY MADE FROM THEM. THAT WOULD BE VERY HELPFUL TO THE CASE.

THE COURT:: ALL RIGHT. IS THERE A PROBLEM, DEFENSE, WITH FULFILLING THE WRITTEN DISCOVERY REQUESTS YOUTVE ALREADY RECEIVED?

MR. GEARY: YOUR HONOR, I THINK THE ISSUE WITH REGARD TO THOSE IS BOTH OF THOSE REQUESTS ARE PROPOUNDED TO THE CHURCH. HOWEVER, THEY BOTH SEEK EVIDENCE AND INFORMATION THAT IS IN POSSESSION OF B.Y.U. IT IS NOT IN THE CHURCH'S POSSESSION.

THE COURT:: B.Y.U., CAN YOU COOPERATE AND HELP --

THE PLAINTIFF: I'M GOING TO HAVE TO CALL YOU BACK. MY PHONE IS GOING TO CUT OUT IN 3 SECONDS. ITM GOING TO CALL YOU BACK AS SOON AS I GET SOME QUARTERS, OKAY?

THE COURT:: ALL RIGHT.

(PAUSE)

TELL ME, IS IT GOING TO BE MR. STEELE? I GUESS THE BURDEN FALLS ON YOU. CAN YOU COOPERATE WITH THE CHURCH IN MAKING THIS INFO AVAILABLE.

MR. STEELE: YES, YOUR HONOR. WETRE HAPPY TO ASSIST IN MAKING THOSE DISCOVERY RESPONSES COMPLETE, SO WE HAVE NO OBJECTION TO THE INFORMATION HE'S ASKED FOR. I BELIEVE I HAVE THAT INFORMATION AND CAN PRODUCE IT.

THE COURT:: YEAH. PLAINTIFF, CAN YOU HEAR ME NOW? PLAINTIFF?

THE PLAINTIFF: HELLO.

THE COURT:: PLAINTIFF, CAN YOU HEAR ME?

THE PLAINTIFF: YEAH, I CAN HEAR YOU NOW.

THE COURT:: OKAY. WHAT MR. STEELE FROM B.Y.U. SAID IS YES, HE WILL HELP THE CHURCH — THEY'LL GET THE INFORMATION TO YOU AS QUICKLY AS POSSIBLE. DO YOU HAVE A NUMBER WHERE THEY CAN REACH YOU SO THEY CAN SET UP THE DEPOSITION?

THE PLAINTIFF: I DON'T. THEY HAVE MY E-MAIL ADDRESS THOUGH, OR I CAN CALL THEM.

THE COURT:: MR. GEARY, DO YOU KNOW HOW TO GET IN TOUCH WITH PLAINTIFF.

MR. GEARY: WE DO HAVE AN E-MAIL FOR HIM, YOUR HONOR. ONE FURTHER CLARIFICATION IF I COULD.

THE COURT:: SURE.

MR. GEARY: MR. TOWSEY MR. BRAMHALL, TWO OF THE PROPOSED DEPONENTS, WE DO NOT CONTROL THEM.

THE COURT:: I UNDERSTAND.

MR. GEARY: AND SO WHAT I WOULD ASK IS A CLARIFICATION. ORDINARILY IT SHOULD PLAINTIFF'S BURDEN TO SUBPOENA THE WITNESSES AND HAVE THE TIME THERE. IT'S NOT A BURDEN OR EXPENSE THAT IS APPROPRIATELY LAID UPON US. IF WE CAN JUST HAVE THAT CLARIFICATION.

THE COURT:: AND I UNDERSTAND THAT. HOWEVER, IT APPEARS TO ME FROM THE RELATIONSHIP BETWEEN THE CHURCH AND THOSE TWO GENTLEMEN THAT MAYBE THEY WOULD BE WILLING SIMPLY TO SHOW UP AT A DESIGNATED TIME. WOULD IT BE TOO MUCH OF A BURDEN UPON THE DEFENSE IF I ASKED YOU TO ARRANGE THAT AS MUCH AS POSSIBLE?

MR. GEARY: WE CAN INQUIRE OF THEM. AND THEY'VE BEEN WILLING TO WORK WITH US BEFORE. AS LONG AS IT IS NOT OUR RESPONSIBILITY UNDER

THE COURT:'S ORDER TO SUBPOENA THEM AND COMPEL THEIR ATTENDANCE.

THE COURT:: NO. AND I DON'T -- IF YOU GET DOWN TO WHERE THEIR ATTENDANCE MUST BE COMPELLED, THEN I WOULD ASK THAT THE DEFENSE AND PLAINTIFF WORK THAT OUT. BUT MY BET IS

THAT IT'S NOT GOING TO HAVE TO BE COMPELLED, OKAY? ALL RIGHT. I'M GOING TO ASK YOU, DEEENSE, TO SIMPLY PREPARE AN ORDER SAYING —— PARTICULARLY THE QUESTION OF SANCTIONS. I AM

GOING TO HOLD IN ABEYANCE THE MOTION TO AMEND TO SOME DEGREE -- ALTHOUGH I RECOGNIZE THAT THERE IS UNDER UTAH LAW NO TORT FOR BREACH OF CONFIDENCE, IF WE RESOLVE THE ISSUE OF ANY SORT OF COMMUNICATION, THAT WILL TAKE CARE OF VERY EASILY THE MOTION TO AMEND. OKAY?

THE PLAINTIFF: OKAY.

THE COURT:: ALL RIGHT. AND SO I'M GOING TO ASK YOU, DEFENSE, TO PLEASE PREPARE A PROPOSED ORDER. OKAY. AS SOON AS YOU FILE YOUR -- OH, THEN YOU KNOW YOUR DATES, THE SCHEDULING DATES. AS SOON AS THE DISCOVERY IS FINISHED, DID I GIVE YOU A DATE FOR YOU TO FILE YOUR RENEWED MOTION?

MR. ORTON: YOU SAID ONE MONTH. YOU DIDN'T GIVE US A SPECIFIC DATE.

THE COURT:: ONE MONTH. SO I'LL BE FAIRLY FLEXIBLE. AND THEN YOU HAVE A MONTH TO OPPOSE. AND I'LL GIVE YOU TEN DAYS FOR REPLY. SO FILL IN THE DATES AND I WILL BE ABLE, I AM SURE, TO RULE ON THE BRIEFS. OKAY.

MR. STEELE: YOUR HONOR, MAY I ASK ONE POINT OF CLARIFICATION?

THE COURT:: SURELY.

MR. STEELE: IN TERMS OF US ASSISTING THE CHURCH IN RESPONDING TO DISCOVERY REQUESTS PROPOUNDED TO THE CHURCH AND NOT TO B.Y.U., I JUST WANT TO MAKE SURE MR. RAISER ON THE RECORD AGREES THAT IF WE PROVIDE THOSE DOCUMENTS TO THE CHURCH, HE WON'T CONSIDER THAT A BREACH OF PRIVACY BECAUSE FRANKLY THOSE ALLEGATIONS CONTINUE TO OCCUR.

THE COURT:: DO YOU UNDERSTAND THAT? YOU'RE ASKING FOR -- WHAT YOUTRE ASKING THE CHURCH TO DO, THE CHURCH NEEDS B.Y.U. SO B.Y.U. IS GOING TO HAVE TO GIVE TO THE CHURCH SOME INFORMATION THAT PROBABLY FOCUSES ON YOU. DO YOU AGREE THAT THE INFORMATION THAT THEY GIVE TO THE CHURCH TO FULFILL YOUR DISCOVERY REQUESTS WILL NOT BE THE SUBJECT OF A LAWSUIT JUST BY THEIR PROVIDING IT?

THE PLAINTIFF: ARE YOU ASKING ME, THE PLAINTIFF?

THE COURT:: YEAH, I AM. BECAUSE THE CHURCH DOESN'T WANT TO HAVE A CAUSE OF ACTION BROUGHT AGAINST THEM FOR GIVING -- I MEAN B.Y.U. DOESN'T WANT ANOTHER LAWSUIT BROUGHT AGAINST IT –

THE PLAINTIFF: NO. IT'S JUST -- YEAH, I CAN AGREE TO THAT. WE'LL JUST LIMIT IT TO ——

THE COURT:: OKAY. AND YOU PUT THAT IN THE ORDER AND I WILL SIGN IT.

MR. STEELE: THE ONLY OTHER POINT OF CLARIFICATION, YOUR HONOR, IS WITH RESPECT TO THE DEPOSITIONS THAT MR. RAISER MAY CHOOSE TO TAKE, I'M PRESUMING THOSE WITNESSES IN LIGHT OF THE CURRENT ENVIRONMENT WOULD WANT TO BE SUBJECT TO A SUBPOENA WHEN THEY TESTIFY, GIVEN THE SENSITIVE NATURE OF THE INFORMATION I ANTICIPATE WILL BE BROUGHT TO LIGHT IN THOSE DEPOSITIONS.

THE COURT:: ALL RIGHT. MR. RAISER, WHAT THEY'RE SAYING -- WHAT MR. STEELE OF B.Y.U. HAS SAID IS THE WITNESSES MIGHT MAKE THEMSELVES AVAILABLE, BUT YOU NEED TO BE PREPARED TO GET HERE A DAY OR TWO EARLY, GET THE SUBPOENAS,

GIVE THEM THE SUBPOENAS SO THAT THEY CAN BE PROTECTED BY THE SUBPOENA POWER OF THE COURT. DO YOU UNDERSTAND THAT?

THE PLAINTIFF: YEAH, I UNDERSTAND. I CAN DO ALL THAT.

THE COURT:: OKAY. ALL RIGHT. THEN THAT'S FINE.

MR. STEELE: WE'LL ACCEPT SERVICE OF THOSE SUBPOENAS AS TO ANYBODY EMPLOYED BY E.Y.U.

THE COURT:: AND DO YOU UNDERSTAND WHAT THAT MEANS PLAINTIFF?

THE PLAINTIFF: YEAH. I CAN SERVE THEM FOR ERIC DAVIS.

THE COURT:: YEAH. OKAY. ALL RIGHT. THEN I THINK WE'VE GOT IT COVERED. IS IT CLEAR TO EVERYBODY WHAT WE'RE GOING TO DO?

MR. ORTON: IT IS.

THE COURT:: PLAINTIFF, IS IT CLEAR TO YOU WHAT WE'RE GOING TO DO?

THE PLAINTIFF: YEAH. I BELIEVE IT'S UNDERSTOOD

WHAT -- HOW WE'RE GOING TO PROGRESS.

THE COURT:: OKAY. THANK YOU. WE'RE IN RECESS.

THE PLAINTIFF: OKAY. APPRECIATE YOUR TIME.

(HEARING CONCLUDED AT 3: P.M.)

* * *

Appendix E – Reply on Motion To Amend Complaint [excerpts]

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

Civil No. 2:04CV00896 TC
Hon. Tena Campbell

Reply re: Motion to Amend Complaint

Plaintiff maintains Utah recognizes the common law and the common law recognizes a cause of action for breach of confidence. The cause of action is essentially a breach of privacy action where the information is communicated to a few instead of many. See, e.g., Peterson v. Idaho First Nat'l Bank, 83 Idaho 578

***

Further, Plaintiff deserves the opportunity to further amend the complaint to allege a possible claim for negligence, breach of fiduciary duty, breach of implied contract to state a claim for relief based on the same set of facts. The stake president owed Plaintiff a duty of car regarding the information at issue is alleged.

***

Dated January 25, 2005

T.G._____

Appendix F – Mr. Davis Affidavit

R. Willis on (Bas No. 2484)
Stephen W. Geary (Baz No, 9635)
KIRTON & McCONKIE
60 East South Temple 01800
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600

Attorneys for Defendant The Church of

Jesus Christ of Latter-day Saints

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

Civil No. 2:04CV00896 TC
Hon. Tena Campbell

AFFIDAVIT OF ERIK G. DAVIS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF UTAH)

:ss.

COUNTY OF UTAH)

I, Erik. G. Davis, being duly sworn upon oath, depose and state:

1. I am employed as an Assistant General Counsel of defendant Brigham Young University ("BYU" or the University"). I have personal knowledge of the matters testified to herein.

2. I have been employed at BYU in the Office of the General Counsel since May of 2001.

3. I have been informed and believe that Eugene Braixihall was formerly the General Counsel of B W, but at no time during my employment has he held that office or any other position in the Office of the General Counsel, and 1 have never worked under his direction.

4. Paragraph 17 of the Complaint in this matter alleges:

On or about 2 November 2003, defendant [BYU] through their General Counsel published that information in a public document that the Plaintiff in this bad a "known ... psychiatric history."

I am the author of the language quoted, which is an excerpt from a memorandum I filed with this Court on or about November 4, 2002, in another lawsuit filed by plaintiff against BYU. In that memorandum I described a number of occasions on which plaintiff had been arrested and wrote:

These incidents and the circumstances surrounding them have justifiably caused BYU Police officers to treat Mr. [T.G.] with a certain amount of caution but their actions towards Mr. [T.G.] have in all ways been reasonable and justified in light of Mr. [T.G.]'s suspicious and bizarre behavior and his known criminal and psychiatric history.

5. The above-quoted reference to plaintiff's "psychiatric history" is not based on information supplied by

Eugene Bramball or any other person in the Office of the General Counsel, nor is it based on information supplied by Mr. Dan Towsey or defendant The Church of Jesus Christ of Latter-day Saints. Rather, I obtained that information from records maintained by the University Police and provided to me for the purpose of defending the University against plaintiff's allegations in that lawsuit of unlawful behavior by University Police. Mr. Bramhall was not consulted for any information contained in that filing and had no input on it.

6. Although the Complaint alleges that the memorandum was "published" in November 2003, it was actually filed with the Court in November 2002. Neither I nor any other person in the Office of General Counsel republished that memorandum or any other reference to plaintiff's "known ... psychiatric history,, in November 2003 or otherwise.

DATED this 7th day of December, 2004

_____

Erick G. Davis

SUBSCRIBED AND SWORN TO before me this 7th day of December 2004 /s_____ [seal]

Appendix G – BYU Supplemental Response by Court Order

Daniel L. Steele (6336)
David M. Kono (8770)
BENNETT TUELLER JOHNSON & DEERE
Attorneys for Defendant Brigham Young University
3865 South Wassich Blvd., Suite 300
Salt Lake City, Utah, 84109
Telephone: (801) 272-5600

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

Civil No. 2:04CV00896 TC
Hon. Tena Campbell

DEFENDANT BRINGHAM YOUNG UNIVERSITY'S SUPPLEMENTAL AND AMENDED RESPONSES TO PLANTIFF'S REQUEST FOR DISCOVERY #3

(Interrogatory Numbers 8 and 10)

Defendant Brigham Young University ("BYU"), by and through its counsel and pursuant to the Court's Memorandum Decision and Order dated November 2, 2005 (the "Order"), hereby supplements and amends its responses to Plaintiff's Request for Discovery #3 (Interrogatory Numbers 8 and 10) ("Raiser's Discovery Requests"),

GENERAL OBJECTIONS

1. BYU objects to Raiser's Discovery Requests to the extent they (a) are vague, over broad and unduly burdensome; (b) call for responses that constitute privileged information, including responses and other items of information prepared in anticipation of litigation or for trial; (or (c) call for responses that fall within the attorney-client privilege or the work-product doctrine.

2. Each of the general objections act forth herein shall be deemed to have been made with respect to each specific interrogatory unless indicated.

3. BYU further objects Raiser's Discovery Requests in that they have been

Issued and signed by "T.G." in violation of the Court's prior ruling on the issue of Plaintiff's rule of a pseudonym in this matter. By responding to Raiser's Discovery Requests, BYU reserves and does not waive its rights to move to strike all pleadings and discovery requests filed by Plaintiff under the pseudonym "T.G."

4. Subject to the foregoing objections and reservations, which are incorporated into each and every answer made by BYU to Raiser's Discovery Requests, the following answers are provided based upon review of matters to date. BYU reserves the right to supplement, withdraw, and/or amend its answers if and when additional information is obtained.

INTEROGATORY NO. 8 Did Dave Thomas from General Counsel [sic] Office for Brigham Young University ever discuss anything with Eugene Bramhall that touched upon or was in any way related to the issue of T.G. having a psychiatric history of mental illness [sic].

ORIGINAL RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege.

SUPPLEMENTAL & AMENDED RESPONSE: BYU incorporates herein its previous objections to this request. However, in good faith, pursuant to the Order, and without waiving attorney-client or attorney work-product privileges, BYU amends and supplements its response as follows. In the course of his employment as Associate General Counsel, David Thomas first learned that Plaintiff had a psychiatric history from University Police who told him that Plaintiff had "walked away" from a psychiatric facility. Mr. Thomas reported this to Eugene Bramhall. Mr. Bramhall has never told Mr. Thomas anything that touched upon or was in any way related to the issue of Plaintiff having a psychiatric history or mental illness.

INTEROGATORY NO. 10 Did Dave Thomas from General Counsel [sic] Office for Brigham Young University ever discuss or mention, or suggest anything to Erik Davis relative [sic] T.G. having a psychiatric history of mental illness.

ORIGINAL RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client and the attorney work-product privilege.

SUPPLEMENTAL & AMENDED RESPONSE: BYU incorporates herein its previous objections to this request. However, in good faith, pursuant to the Order, and without waiving attorney-client or work-product privileges, BYU amends and supplements its response as follows. After Mr. Thomas learned from University Police that Plaintiff been in a psychiatric facility, he briefly and informally discussed with Mr. Davis the possibility that Plaintiff might have a psychiatric history or suffer a mental illness. Mr. Davis then obtained and examined University Police records and based his statement regarding Plaintiff's "known... psychiatric history" solely on his own examination of these records, specifically upon the "Intelligence Report" contained in those records.

DATED this 7 day of November, 2005

AS TO OBJECTIONS

BENNETT TEULLER JOHNSON & DEERE

David M. Kono

Attorneys for Brigham Young University

Appendix H – BYU Discovery Response

Daniel L. Steele (6336)
David M. Kono (8770)
BENNETT TUELLER JOHNSON & DEERE
Attorneys for Defendant Brigham Young University
3865 South Wassich Blvd., Suite 300
Salt Lake City, Utah, 84109
Telephone: (801) 272-5600

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

Civil No. 2:04CV00896 TC
Hon. Tena Campbell

DEFENDANT BRINGHAM YOUNG UNIVERSITY'S RESPONSES TO PLANTIFF'S REQUEST FOR DISCOVERY #3

Defendant Brigham Young University ("BYU"), by and through its counsel hereby responds to Plaintiff's Request for Discovery #3 ("Raiser's Discovery Requests") as follows:

GENERAL OBJECTIONS

1. BYU objects to Raiser's Discovery Requests to the extent they (a) are vague, over broad and unduly burdensome; (b) call for responses that constitute privileged information, including

responses and other items of information prepared in anticipation of litigation or for trial; (or (c) call for responses that fall within the attorney-client privilege or the work-product doctrine.

2. Each of the general objections act forth herein shall be deemed to have been made with respect to each specific interrogatory unless indicated.

3. BYU further objects Raiser's Discovery Requests in that they have been Issued and signed by "T.G." in violation of the Court's prior ruling on the issue of Plaintiff's rule of a pseudonym in this matter. By responding to Raiser's Discovery Requests, BYU reserves and does not waive its rights to move to strike all pleadings and discovery requests filed by Plaintiff under the pseudonym "T.G."

4. Subject to the foregoing objections and reservations, which are incorporated into each and every answer made by BYU to Raiser's Discovery Requests, the following answers are provided based upon review of matters to date. BYU reserves the right to supplement, withdraw, and/or amend its answers if and when additional information is obtained.

INTEROGATORY NO. 1 Was Dave Thomas from General Counsel [sic] Office for Brigham Young University in possession of information related to the issue of T.G.'s psychiatric history/mental illness prior to November 20, 2002 [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege.

INTEROGATORY NO. 2 If the answer to #1 is in the affirmative, what was the source of the information regarding T.G,'s psychiatric history of mental illness [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege.

INTEROGATORY NO. 3 Were any other members, past (back until January 1, 2002) or present, other than Mr. Bramhall, in possession of information regarding T.G.'s psychiatric history of mental illness?

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege.

INTEROGATORY NO. 4 If #3 is affirmative, what are their names.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege.

INTEROGATORY NO. 5 Has any member of General Counsel's office, present or past (back until January 1, 2002) ever discussed T.G. with Eugene Bramhall?

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege. Without waiving these objections, a current member of the Office of the General Counsel at BYU has discussed Plaintiff with Eugene Bramshall as more specifically set forth below BYU's response to Interrogatory No. 6.

INTEROGATORY NO. 6 If #5 is affirmative, what are their names [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege. Without waiving these objections, Erik Davis has discussed Plaintiff with Eugene Bramhall but did not learn of Plaintiff's psychiatric history of mental illness from Mr. Bramhall. Instead, Mr. Davis learned of Plaintiff's psychiatric history of mental illness from the police records which have been previously produced to Plaintiff by BYU.

INTEROGATORY NO. 7 Has any member of General Counsel's office, present or past (back until January 1, 2002) ever been informed by another member or employee of General Counsel's office, present or past (back until January 1, 2002) anything related to T.G.'s psychiatric history of mental illness [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege.

INTEROGATORY NO. 8 Did Dave Thomas from General Counsel [sic] Office for Brigham Young University ever discuss anything with Eugene Bramhall that touched upon or was in any way related to the issue of T.G. having a psychiatric history of mental illness [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege.

INTEROGATORY NO. 9 Did Dave Thomas from General Counsel [sic] Office of Brigham Young University ever discuss T.G. with Erik Davis [sic].

RESPONSE: (Raiser's Discovery Requests include two identical interrogatories identified as "Interrogatory No. 9." Accordingly, BYU responds herein only once to Interrogatory No. 9 as follows.) BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client work-product privilege. Without waiving these objections, David Thomas has discussed Plaintiff with Erik Davis in connection with the Plaintiff's lawsuits against BYU.

INTEROGATORY NO. 10 Did Dave Thomas from General Counsel [sic] Office for Brigham Young University ever discuss or mention, or suggest anything to Erik Davis relative [sic] T.G. having a psychiatric history of mental illness.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client and the attorney work-product privilege.

RESPONSE TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: All records relating to T.G.'s being banned from campus between January 1997 – July 2000.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request to the extent that the responses to the request violate the attorney-client privilege and/or the attorney work-product privilege. Additionally, the request is not reasonably calculated to lead to the discovery of admissible evidence in that none of Plaintiff's claims for relief in either his Complaint or proposed Amended Complaint would be supported by information responsive to Request No. 1.

REQUEST NO. 2: All records relating to T.G.'s [sic] being admitted to BYU spring of 1992.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. Without waiving these objections, Request No. 2 is duplicative of request #2 contained in "Plaintiff's request for discovery" (#1). The documents responsive to this request have already been produced to Plaintiff by way of Defendant The Church of Latter-day Saints' (the "Church") responses to Plaintiff's Request for Discovery (#1).

REQUEST NO. 3: All records relating to T.G.'s [sic] in possession of BYU [sic] police between May 1991 & July 2000.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request in that it is not reasonably calculated to lead to the discovery of admissible evidence. To the extent that any BYU police records are

potentially relevant to Plaintiff's alleged claims, they have already been produced by BYU to Plaintiff by way of the Church's response to request #1contained in "Plaintiff's request for discovery" (#1).

DATED this 7 day of July, 2005

AS TO OBJECTIONS

BENNETT TEULLER JOHNSON & DEERE

Daniel L. Steele

Attorneys for Brigham Young University

Appendix I – BYU Discovery Response

Daniel L. Steele (6336)
David M. Kono (8770)
BENNETT TUELLER JOHNSON & DEERE
Attorneys for Defendant Brigham Young University
3865 South Wassich Blvd., Suite 300
Salt Lake City, Utah, 84109
Telephone: (801) 272-5600

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

Civil No. 2:04CV00896 TC
Hon. Tena Campbell

DEFENDANT BRINGHAM YOUNG UNIVERSITY'S RESPONSES TO PLANTIFF'S REQUEST FOR DISCOVERY #6

Defendant Brigham Young University ("BYU"), by and through its counsel hereby responds to Plaintiff's Request for Discovery #6 ("Raiser's Discovery Requests") as follows:

GENERAL OBJECTIONS

1. BYU objects to Raiser's Discovery Requests to the extent they (a) are vague, over broad and unduly burdensome; (b) call for responses that constitute privileged information, including responses and other items of information prepared in anticipation of litigation or for trial; or (c) call for responses that fall within the attorney-client privilege or the work-product doctrine.`

2. Each of the general objections act forth herein shall be deemed to have been made with respect to each specific interrogatory unless indicated.

3. BYU further objects to Raiser's Discovery Requests in that they have been Issued and signed by "T.G." in violation of the Court's prior ruling on the issue of Plaintiff's use of a pseudonym in this matter. By responding to Raiser's Discovery Requests, BYU reserves and does not waive its rights to move to strike all pleadings and discovery requests filed by Plaintiff under the pseudonym "T.G." or any other pseudonym in this matter.

4. Subject to the foregoing objections and reservations, which are incorporated into each and every answer made by BYU to Raiser's Discovery Requests, the following answers are provided based upon review of matters to date. BYU reserves the right to supplement, withdraw, and/or amend its answers if and when additional information is obtained.

INTEROGATORY NO. 1 Are any current members for general counsel for byu [sic] in possession of information regarding T.G.'s alleged psychiatric history/mental illness [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney work-product privilege. Without waiving these objections, current members of the Office of the General Counsel for BYU are in possession of information regarding Plaintiff's psychiatric history/mental illness.

INTEROGATORY NO. 2 If #1 is in the affirmative, what was their names [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney work-product privilege. Without waiving these objections, Erik Davis and David Thomas are in possession of the abovd-referenced information.

INTEROGATORY NO. 3 Has any current member of General Counsel's office, ever discussed T.G. with Eugene Bramhall [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client and attorney work-product privilege. Without waiving these objections, a current member of the Office of the General Counsel for BYU has discussed Plaintiff with Eugene Bramhall as more specifically set forth in BYU's response to Interrogatory No. 4.

INTEROGATORY NO. 4 If #3 is affirmative, what are their names.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client and attorney work-product privilege. Without waiving this objection, Erik Davis has discussed Plaintiff with Eugene Bramhall but did not learn of Plaintiff's psychiatric history/mental illness from Mr. Bramhall. Instead, Mr. Davis learned of Plaintiff's psychiatric history/mentall illness from the police records which have been previously produced to Plaintiff by BYU.

INTEROGATORY NO. 5 What were all the sources whereby Dave Thomas from General Counsel [sic] Office for Bringham Young Unifersity learned of T.G's psychiatric history/mental illness or the likelihood thereof [sic].

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad and assuming facts not in evidence. BYU further objects to this request as violative of the attorney-client and attorney work-product privilege.

RESPONSE TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: All records relating to the BYU police accreditation by the State of Utah that related to special

conditions that must be complied with in order for BYU to maintain a police dept.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. Without waiving these objections, BYU anticipates that the only document responsive to Request No. 1 is a copy of correspondence from the State of Utah which authorizes BYU "to maintain a police department." BYU is currently in the process of locating and obtaining this document and will produce the document or make it available for Plaintiff's copying or review upon its receipt of same. The same document is also available from the State of Utah.

REQUEST NO. 2: All records related to BYU police accreditation by the State of Utah not contained in Request #1.

RESPONSE: See BYU's response to No. 1.

REQUEST NO. 3: Address and Phone number of Hal Visick.

RESPONSE: BYU objects to this request as not reasonable calculated to lead to the discovery of admissible evidence. Without waiving this objection, Mr. Vixick's address and telephone number (Mr. Visick's contact information is contained in the local telephone directory) are as follows: 1754 North 1558 East, Provo, Utah 84604 (801) 375-7594). Because of potential issues relating to attorney-client and work-product privilege, Mr. Visick may only be contacted through BYU.

DATED this 5th day of July, 2005

AS TO OBJECTIONS

BENNETT TEULLER JOHNSON & DEERE

Daniel L. Steele

Attorneys for Brigham Young University

Appendix J – BYU Discovery Response

Daniel L. Steele (6336)
David M. Kono (8770)
BENNETT TUELLER JOHNSON & DEERE
Attorneys for Defendant Brigham Young University
3865 South Wassich Blvd., Suite 300
Salt Lake City, Utah, 84109
Telephone: (801) 272-5600

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

Civil No. 2:04CV00896 TC
Hon. Tena Campbell

DEFENDANT BRINGHAM YOUNG UNIVERSITY'S RESPONSES TO PLANTIFF'S REQUEST FOR DISCOVERY #8

Defendant Brigham Young University ("BYU"), by and through its counsel hereby responds to Plaintiff's Request for Discovery #8 ("Raiser's Discovery Requests") as follows:

GENERAL OBJECTIONS

1. BYU objects to Raiser's Discovery Requests to the extent they (a) are vague, over broad and unduly burdensome; (b) call for responses that constitute privileged information, including responses and other items of information prepared in anticipation of litigation or for trial; or (c) call for responses that fall within the attorney-client privilege or the work-product doctrine.

2. Each of the general objections set forth herein shall be deemed to have been made with respect to each specific interrogatory unless indicated.

3. BYU further objects to Raiser's Discovery Requests in that they have been issued and signed by "T.G." in violation of the Court's prior ruling on the issue of Plaintiff's use of a pseudonym in this matter. By responding to Raiser's Discovery Requests, BYU reserves and does not waive its rights to move to strike all pleadings and discovery requests filed by Plaintiff under the pseudonym "T.G." or any other pseudonym in this matter.

4. Subject to the foregoing objections and reservations, which are incorporated into each and every answer made by BYU to Raiser's Discovery Requests, the following answers are provided based upon review of matters to date. BYU reserves the right to supplement, withdraw, and/or amend its answers if and when additional information is obtained.

REQUESTS FOR ADMISSIONS #1: Admit that Dave Thomas spoke to Eugene Bramhall about T.G. prior to November 2, 2002.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly briad, BYU further objects to this request as violative of the attorney-client privilege and work-product doctrine.

REQUESTS FOR ADMISSIONS #2: Admit that Dave Thomas spoke to Erik Davis about T.G. prior to November 2, 2002.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this

request as violative of the attorney- client privilege and the work-product doctrine.

REQUESTS FOR ADMISSIONS #3: Admit that Dave Thomas was aware that T.G. had an alleged psychiatric history/mental illness prior to November 2, 2002.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney- client privilege and th work-product doctrine.

RESPONSE TO REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: Produce the article published by the school newspaper internet [sic] of and or concerning T.G. on or about August 29, 2000.

RESPONSE: BYU objects to this request as vague, ambiguous. BYU futher objects to this request as not reasonably calculated to lead to the discovery of admissible evidence in that none of Plaintiff's claims for relief in either his Complaint or proposed Amended Complaint would be supported by information responsive to Request No. 1.

REQUEST NO. 2: Produce the article published by the school newspaper on or about September 1, 1999 or and concerning T.G. and the retraction of that article on or about December, [sic] 1999.

RESPONSE: BYU objects to this request as vague and ambiguous. BYU further objects to this request as not reasonably calculated to lead to the discovery of admissible evidence in that none of Plaintiff's claims for relief in either his Complaint or proposed Amended Complaint would be supported by information responsive to Request No. 2.

DATED this 14th day of July, 2005

AS TO OBJECTIONS

BENNETT TEULLER JOHNSON & DEERE

Daniel L. Steele

Attorneys for Brigham Young University

Appendix K – BYU Discovery Response

Daniel L. Steele (6336)
David M. Kono (8770)
BENNETT TUELLER JOHNSON & DEERE
Attorneys for Defendant Brigham Young University
3865 South Wassich Blvd., Suite 300
Salt Lake City, Utah, 84109
Telephone: (801) 272-5600

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

Civil No. 2:04CV00896 TC
Hon. Tena Campbell

DEFENDANT BRINGHAM YOUNG UNIVERSITY'S RESPONSES TO PLANTIFF'S REQUEST FOR DISCOVERY #9

Defendant Brigham Young University ("BYU"), by and through its counsel hereby responds to Plaintiff's Request for Discovery #9 ("Raiser's Discovery Requests") as follows:

GENERAL OBJECTIONS

1. BYU objects to Raiser's Discovery Requests to the extent it (a) is vague, over broad and unduly burdensome; (b) call for responses that constitute privileged information, including responses and other items of information prepared in anticipation of litigation or for trial; or (c) call for responses that fall within the attorney-client privilege or the work-product doctrine.

2. Each of the general objections set forth herein shall be deemed to have been made with respect to each specific request unless otherwise indciated.

3. BYU further objects to Raiser's Discovery Requests in that they have been issued and signed by "T.G." in violation of the Court's prior ruling on the issue of Plaintiff's use of a pseudonym in this matter. By responding to Raiser's Discovery Requests, BYU reserves and does not waive its right to move to strike all pleadings and discovery requests filed by Plaintiff under the pseudonym "T.G." or any other pseudonym in this matter.

4. BYU further objects to Raiser's Discovery Request in that the requested response to the same falls outside of the July 19, 2005 discovery deadline imposed by this Couirt.

5. Subject to the foregoing objections and reservations, which are incorporated into each and every answer made by BYU to Raiser's Discovery Requests, the following answers are provided based upon review of matters to date. BYU reserves the right to supplement, withdraw, and/or amend its answers if and when additional information is obtained.

REQUESTS FOR ADMISSIONS #1: Admit the police files were not the sole sources by which Erik Davis learned of Plaintiff's alleged psychiatric history or alleged mental illness related issues regarding T.G.

RESPONSE: BYU objects to this request as vague, ambiguous, and overly broad. BYU further objects to this request as violative of the attorney-client privilege and/or work-product doctrine. Without waiving these objections, BYU asserts that it has not alleged any psychiatric history or mental illness with regard to plaintiff Aaron Raiser other than the single reference in its November 2002 Memorandum to Raiser's "known... psychiatric history." BYU affirmatively

denies that this reference was based on any source other than the police report which, in pertinent part, stated Raiser had walked away from a Psychiatric Hospital in Columbus, OH."

DATED this 5th day of August, 2005

AS TO OBJECTIONS

BENNETT TEULLER JOHNSON & DEERE

Daniel L. Steele

Attorneys for Brigham Young University

Appendix L – U.S. Constitution Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix M Fed. R. Civ. Proc.

15(a), 26 (b), 30(b)(7), 31

Rule 15. Amended and Supplemental Pleadings

(a) Amendments.
A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence.
When issues not raised by the pleadings are tried by express

or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. Proc. 26

(b) Amendments to Conform to the Evidence.
When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance

to enable the objecting party to meet such evidence.

***

(5) Claims of Privilege or Protection of Trial Preparation Materials.
(A) Information Withheld.

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial -preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced.

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.
Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the

movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in

part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

***

Fed. R. Civ. Proc. 30

(b) (7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

Fed. R. Civ. Proc. 31

Rule 31. Depositions Upon Written Questions

(a) Serving Questions; Notice.
(1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

***

Appendix N – Email Re: Discovery

Subject:
Date: Fri, 24 Jun2005 12:01:14 -0600
From: "Dan Steele" <dsteele@btjd.com> Add to Address Book
To: "aaron raiser" <aaronraiser@yahoo.com>
CC: "Willis Orton" <worton@kmclaw.com>, "David Kono" <dkono@btjd.com>

Mr. Raiser,

Mr. Davis is available for your deposition questioning on the afternoon of Monday, July 18, 2005. Please let us know if you intend to schedule his deposition. You will need to issue a notice. Also, be advised that BYU does not and will not waive the attorney client privilege with respect to your questioning of Mr. Davis or Mr. Bramhall, presuming you depose Mr. Bramhall.

Daniel L. Steele
Bennett Tueller Johnson & Deere
3865 South Wasatch Blvd., Suite 300
Salt Lake City, Utah 84109-3865
telephone: (801) 272-5600
facsimile: (801) 278-1541